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1109

No. 3012

United States
Circuit Court of Appeals

For the Ninth Circuit.

1109

Transcript of Record.

(IN SIX VOLUMES)

THE KOKE COMPANY OF AMERICA, THE SOUTHERN
KOKE COMPANY, LIMITED, THE KOKE COMPANY OF
TEXAS, THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,

Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,

Appellee.

VOLUME IV.
(Pages 1185 to 1660, Inclusive.)


Upon Appeal from the United States District Court for the
District of Arizona.

Filed

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F. D. Monckton,

Clerk.



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**Upon Appeal from the United States District Court for the
District of Arizona.**

(Deposition of J. M. Smith.)

Cross-examination.

I had a few calls for the specific drink Matthews Cola. They ask for Dope. It is not marked Dope, but that is the way they bill it to me as Dope. There is a difference in the profit in favor of Matthew's syrup, it costs less [913] than Coca-Cola. Some customers know about the Matthew's syrup and some do not know there is such a drink on the market. My customers know there is such a drink as Coca-Cola on the market. I do not believe I ever heard anyone ask for Coca-Cola out at the ball park, because it is such a common expression with men and boys, I do not remember that I ever heard anyone specify Coca-Cola. The word Dope I think applies to any cola drink, that is my honest opinion. Very few calling for Koke or Dope have ever heard of it. I do not know whether people asking for dope expect to get Coca-Cola, Matthew's Cola, or some other cola. I do not know what they mean or expect to get. This drink of Matthew's is advertised as Dope. They left me some advertising, they advertised it as Dope. I am not sure, but I think that is it. I do not remember what was on it, it was a little pamphlet or catalog or something, a trade proposition. I have Coca-Cola advertisements and signs, "Drink Coca-Cola." I have not any on the fountain, that is up on the front of the building. I have not any signs of Matthew's drink. If anybody at my place of business has served Coca-Cola and Koke and Dope out of the same container it must have been a mistake, because we have had two different contain-

(Deposition of J. M. Smith.)

ers, one we keep Coca-Cola syrup in and the other this Matthew's mixture of syrup or Dope. I have not been out of this Matthew's mixture for sixty days. Mistakes are liable to happen. I instruct the dispensers where people ask for Coca-Cola to be sure and give Coca-Cola. I give that instruction for the simple reason that there is no one in that immediate neighborhood that serves pure Coca-Cola without some kind of mixture in it, that is, I have been told that. I could not say positive, but I do sell Coca-Cola and have built up quite a nice little trade on it, and I also give instructions that when they come in and ask for a Dope to give some of these other syrups because of the difference in profit. These products are very similar in appearance.

Mr. HIRSCH.—I now offer in evidence as Complainant's Exhibit No. 12 to the testimony of Mr. B. Freed, this paper.

Deposition of R. K. Smith, for Defendants.

R. K. SMITH.

Direct Examination.

Twenty-eight years of age; live in Nashville for the past five months; [914] before that I lived in Cincinnati, Ohio, and before that Chattanooga, Tennessee. At the present time I am in the soda-water business at United Cigar Stores Company, as head dispenser. I have been dispensing soda water off and on for the past twelve or thirteen years. I am at the fountain now and can hear the names people use in asking for drinks they want. I am not

(Deposition of R. K. Smith.)

at the fountain at all times, so far as that is concerned, but I take a regular watch. We are handling now a general line of drinks such as you find at all soda-fountains. We handle Coca-Cola that is the only one. We have people come into our fountain and ask for Koke and Dope. If it should be a regular customer that I have been in the habit of serving at all times and know what he drinks, I give him Coca-Cola if that is what he drinks, otherwise if he asks for Koke or Dope, I ask if he wants Coca-Cola. The words Koke and Dope mean as applied to soda-fountain beverages. I think that dope would mean any kind of stimulating drink, or caffeine such as that, headache medicine, or Coca-Cola, as a lot of people call that meaning Coca-Cola when they say Dope. I have known of Fletcher's Cola and Dope; they are about the only two colas that I have seen; I have heard of more than that, I suppose, but not very much. If a customer came in and asked for a Koke or a Dope I do not know anything he likes and he has not been a regular customer, why, I would give him the one I made the most on. If I had a dope and he asked for dope, I would be giving him what he is asking for. Dope in my opinion does not exactly specify Coca-Cola. I have people come in and ask for Dope when they want Capudine or any headache medicine, for instance, Bromo-Seltzer. On two or three different occasions I have found that one barrel of Coca-Cola would not exactly taste as the last barrel I used. The last time I remember of having anything like

(Deposition of R. K. Smith.)

that to occur was in Cincinnati, and at the time we got a fresh barrel of Coca-Cola in, we called up the Coca-Cola man there, the manager at the office at Cincinnati and he explained to me that it was possibly in mixing my water with it that that was the cause of the taste being [915] different. It had a little bit different taste to it to what the usual run of Coca-Cola does. It was in the mixing of the syrup, I suppose, because our water was the same we had been serving all the time. We usually keep our soda-fountain carbonated at between 135 and 150 lbs. The low carbonation makes any drink rather flat, and is not as sparkling and as *bighty* as high carbonation would be. The same sample of syrup and made a drink at one soda-fountain where it was highly carbonated, and made it at another one with a lower carbonated water, there is no doubt but there would be a difference in taste, there would not be as much gas in one as there would be in the other. It would be more flat. At the different soda-fountains where I have worked they all do not have the same uniform carbonation. I have had people come in and ask for a Dope and then laugh and say give me a Coca-Cola. I do not know whether or not among our trade the fact that there are other cola syrups on the market and dispensed at the soda-fountains in Nashville, is well known. There is no doubt but that it is known among some people. We have regular trade and transient trade also; more of a regular trade than what you would call transient. When they call there as a rule we know what they want. I

(Deposition of R. K. Smith.)

heard the names Koke and Dope applied to soft drinks for the past eight or ten years, I suppose. I have not sold anything except the straight Coca-Cola. I have no other drinks similar to that one, and, as I said awhile ago, people come in and ask for a Dope and a great many times they mean a headache beverage, something like that; a caffeine drink or something stimulating. I have heard of Celery-Cola. I think about the first time I heard of Celery-Cola was about nine or ten years ago. It is similar to Coca-Cola, in taste and color. I do not remember the first time I heard the word Dope or where I heard it. I remember an occasion where I called in and asked for a Dope, at Harrison, Tenn., and getting a drink. That has been seven or eight years ago that I was out driving with a friend of mine and asked for a Dope, and got a bottle of dope from a little country store. [916] I drank it; it tasted very similar to Coca-Cola. It was labeled Dope. I know what caramel is; we had a caramel coloring; it is really a burnt sugar coloring. It is used to color up vanilla and to make any of the drinks darker provided you want to; it is used mostly for vanilla syrup. It is the only coloring that I know of that will bring out the tone right on account of the color that vanilla should be. It is much lighter than Coca-Cola in color. I think I could tell the difference between a sample of vanilla extract and a sample of Coca-Cola extract if colored to what I think vanilla ought to be colored. I have seen vanilla too dark in my opinion. It is not customary to color

(Deposition of R. K. Smith.)

with caramel in the first place, and it should be that color. I have heard of Cherry Cola; Fletcher's Cola and Star-Cola. I never heard of Rye-Ola. Root beer is dark, very much like Coca-Cola, if anything it might be a little darker. I believe I could tell a glass of each apart, I do not know, I never tested it out that way. I could tell a Coca-Cola barrel if it was labeled Coca-Cola. If it was not labeled possibly I would think it was a Coca-Cola barrel because they are red barrels. I have not seen the wagons delivering the syrups to the soda-fountains around town. It is not customary in this city for soda-fountain people to leave their empties setting out on the sidewalk in front of their places.

Cross-examination.

I saw once a ten-gallon keg that contained a syrup that was called Dope. I do not know who made it. It has been something like two years ago; it was in Ohio. There is no doubt there are men who mean Coca-Cola and ask for it under the name of Dope; use Dope as a nickname for Coca-Cola, and the word Koke too; they use that for a nickname for Coca-Cola. That has been so for sometime in the south. The color depends upon the amount of caramel you use. You can make a different drink, take a white drink and add caramel coloring and you can get anywhere from a pale yellow to a black. That circumstance I related at Harrison, Tenn., when I asked for Dope I expected to get a Coca-Cola.

Redirect Examination. [917]

Out in the country that way we were willing to

(Deposition of R. K. Smith.)

drink anything we could get. It gave satisfaction. At that time anything would give satisfaction. I expected to get Coca-Cola because I had been there at Chattanooga and the rest of the boys around, you know, call it Dope, and had that in my mind when I asked for Dope. I have gone into a near-beer stand or saloon and got a glass of beer, I have asked for it as a glass of foam, a scuttle of suds, or something of that sort. I expected to get whatever they were serving when I asked for the glass. I usually like Schlitz when I could get it in a bottle. If I had been accustomed to get Schlitz beer when I went into a saloon and asked for a glass of foam, I would have Schlitz beer on my mind when I asked for it.

Deposition of F. H. Willis, for Defendants.

F. H. WILLIS.

Direct Examination.

Age eighteen next April; live in Nashville, Tennessee; have lived there two years and two months; occupation, soda dispenser at Ha Ha Store, #3 Arcade, Nashville, Tenn. We are dispensing a general line of soda drinks. Other cola drinks we have besides Coca-Cola is Candy-Cola. The color of Candy-Cola is very similar to Coca-Cola. I do not drink it myself. I have tasted it but I could not hardly tell the difference myself between Coca-Cola. We have customers come into our soda fountain and ask for a Dope or a Koke. I give them a cola, Candy-Cola. I have them come in and ask for a Coca-Cola. When they ask for Coca-Cola I give

(Deposition of F. H. Willis.)

them Coca-Cola. When a customer asks for a Koke or a Dope my understanding is that he wants just some cola, that we might have, that we dispense there. When they ask for Koke and Dope and I serve them Candy-Cola, I consider we are giving them what they ask for. In some cases I regard Koke and Dope as calls for Coca-Cola exclusively and some cases I do not. I have a regular line that calls for Coca-Cola and likewise for Dope, and I serve them. The Candy-Cola is always served for Dope or Koke. Last Monday I believe, a customer thought I was giving him the Cola instead of Coca-Cola, he clerks down at the Western Union. I do not know of but just two cola drinks that I have had anything to do with, that is Fletcher's and Candy-Cola. We have always dispensed Fletcher's [918] Cola. They ask for that as Dope and Koke. I do not regard the names Koke and Dope as the names of a particular cola drink.

Cross-examination.

Fletcher's cola was given when people asked for Dope or Koke. We did that because we made more money on it. I do not know the price of Candy-Cola, whether it is more or less than Coca-Cola. Matthews makes Candy-Cola here in Nashville. I do not know how long I have been using it, nearly seven months I believe. Some of our customers know we are handling Candy-Cola. I do not know whether the general public know of Candy-Cola or not. I never saw any advertising of Candy-Cola. I do not know whether the people who come into

(Deposition of F. H. Willis.)

our store and ask for koke or dope expect to get Candy-Cola, but they expect to get some kind of a cola that we serve there. I do not know what they except to get. I give them Candy-Cola. I never sell Coca-Cola when Koke or Dope is asked for. I have instructions to sell Candy-Cola when Koke or Dope is called for. We do not sell Candy-Cola when Coca-Cola is asked for. These drinks are kept in separate containers in our fountain. When a person comes in and asks for a Coca-Cola I have never given it out of this container containing Candy-Cola, without explaining the difference, I tell them we do not have Coca-Cola in right then but we had a Cola and if they wanted to know who made it, some of them, I told them. I might have served Candy-Cola in response to calls for Coca-Cola. I am not positive I was on duty on Monday, February 8th between 10 and 11 o'clock in the morning. I do not remember about two ladies calling at that time and asking for two glasses of Coca-Cola and the drinks were served to the ladies who sent them back and said you had two kinds of Coca-Cola. We have not but one pump, that is located about the middle of the fountain. (Witness draws the diagram.) In the middle is the pump, that is what I keep my Candy-Cola in. Starting at the dispensers left, call the first one #1, the second #2, three #3 and four #4, then getting on the dispensers right the first—the middle one is #5 and then on the dispensers right the first is #6, next #7 [919] and next #8 and next #9. Candy-Cola is at #5. Coca-

(Deposition of F. H. Willis.)

Cola is 3 and 6. We buy our Coca-Cola all from Spurlock-Neal. I have not the least idea how much we buy, I do not do the buying. We did buy in five and ten gallon kegs. We have been buying it recently a gallon at a time. #5 is labeled Coca-Cola and we keep Candy-Cola in the Coca-Cola jar. #2 I have pineapple syrup in it and never had Coca-Cola syrup in that. Coca-Cola is in #3 now; about a month ago I started putting it in there. Before that it was in #6. We had Coca-Cola in #6 a month ago and now we have got it in #6 and #3. In #7 we keep simple syrup, have kept it there about seven months. I do not know what they kept in there before I went there. I am positive simple syrup has been kept in there for the past month and neither Candy-Cola nor Coca-Cola has been in there. I have worked at The Ocean. We served Coca-Cola there when people asked for koke or dope, shot in the arm, or what else they called them, I was instructed to give Coca-Cola. (Offered in evidence as Complainant's Exhibit #13 to the testimony of Mr. Frank Willis.)

Deposition of F. C. Dorider, for Defendants.

F. C. DORIDER.

Direct Examination.

Age, fifty-five years. Been engaged most of my time in the confectionery and restaurant business. Live here in Nashville; have lived here twenty-seven years. I was first with C. H. A. Goertner for two years and then, I think, about twenty-four years

(Deposition of F. C. Dorider.)

with W. E. Sidebottom. We had a soda-fountain in our place of business when I was a partner with Sidebottom. We had most everything that is sold at a soda-fountain. I know J. C. Mayfield in a business way. I bought goods from him, some kind of goods with a Cola name to it, I cannot recall just now; Celery-Cola, I believe. It was a syrup for a soda-fountain drink. My impression is I first began to buy that Celery-Cola from him 12 or 15 years ago, I cannot recall exactly. We handled different kinds of Cola, Cola-Ade, Celery-Cola, Coca-Cola, and a good many of those colas, I cannot recall them. Mr. Sidebottom did most of the buying; if I bought any Koke I do not remember about it. Cola drinks besides those [920] I have mentioned are Star-Cola, Kola-Ade, and maybe some others. I have heard of Wine of Coca. It was a fountain drink; I do not think we ever handled it. These drinks came to us in large barrels, and some in kegs. I do not remember the color. I do not remember whether they were simply varnished or whether they were red; it strikes me, though, they had some kind of paint or varnish. Sidebottom attended to that, and we would get a lot of that stuff in the store-room and use it up and I would never see it at all. I was about the soda-fountain frequently myself so I would hear the names people used in asking for the drinks. I was up in front—the office was up in front right across from the soda-fountain. I have heard customers come in and ask for Koke or Dope. Well, if we had a customer that was drinking Coca-Cola, we natur-

(Deposition of F. C. Dorider.)

ally gave him Coca-Cola when he called for Dope. We had Celery-Cola—and when they called for dope and we knew they had been in the habit of drinking that we gave them Celery-Cola; we gave them Celery-Cola or Cola-Ade, as a great many of them were in the habit of calling for Dope like they do right now. Celery-Cola had a Celery flavor to it; they were practically the same, but a difference in the taste. If you set a glass of Celery-Cola up on the fountain and a glass of Coca-Cola you could tell by drinking from them which was which. They were very much alike in color. I never heard of any kicks. Of course the boy at the fountain is supposed to know what he is giving out to them; if they called for Dope and he did not know what they wanted, he would ask. If anyone came in and asked for Dope, I would ask him what he wanted and I would give him what he wanted. Some of the names they called for were Kola-Ade, we sold a good deal of Kola-Ade for awhile. Celery-Cola, Coca-Cola, whatever cola we had. We had customers come in and ask for a Dope and when I asked him what he wanted, he would reply that he wanted a Kola-Ade, every day they done that. Celery-Cola is what the most of them said they wanted. I am not now in business with Mr. Sidebottom. It seems to me like we handled Celery-Cola for at least twelve years anyway. I think we were handling it when we dissolved partnership. We began handling Kola-Ade I think about 8 or 9 years [921] ago. I think we handled it about 2 years and then quit. When a cus-

(Deposition of F. C. Dorider.)

tomers would come in and ask for a Dope or a Koke I do not consider he had made a definite and specific request on me for Coca-Cola alone, not unless we knew he was drinking it; I mean a regular Coca-Cola drinker, that I knew wanted Coca-Cola. The word dope means, well, I suppose the Cola people are supposed to give people the impression that they put Cocaine in it, and I think the word dope came from that; I don't know whether the rest of them did or not, but I always thought they did. The word dope as applied to soda-fountain drinks, means no particular drink. We consider it applies to these different drinks, like Kola-Ade, anything with the name Cola to it. I think they have been serving Star-Cola the last year or two at the Ball Park. Most everybody calls it dope; "Give me a dope, boy." I suppose they know what they are getting; I think there is something on the bottle to indicate what it is. I never noticed the bottle carefully. I hear lots of the boys dispensing Star-Cola calling "Dope," some say Star-Cola and some say Dope and different kinds of things. These words Dope and Koke are used in the trade to designate cola drinks as a class. I heard these words Koke and Dope fifteen or eighteen years ago, I reckon. I think during that time they have had the same meaning that they have now. If a customer fifteen or eighteen years ago would come into our soda-fountain and ask for a dope, if we did not know what he wanted we would ask him what he wanted; we considered two or three of them dopes.

(Deposition of F. C. Dorider.)

Cross-examination.

I have known of Coca-Cola, I think, about fifteen years; I think that is along about the first one in the Cola line. I remember definitely people coming into our place of business and asking for a Dope or a Koke and me asking them what they wanted. It happened frequently. Mr. Sidebottom and I were together for twenty-one years. We did not have a soda-fountain all that time. I think we had a fountain for about eighteen years, perhaps, at the beginning we did not have any. We would not always ask what they wanted; some customers would come in and call for it that we knew what they wanted to drink. [922] That was always the instructions we gave the dispenser. Some of them would call for Kola-Ade, some would ask for a dope or a koke and some did not. Kola-Ade is made in Atlanta, I think. I do not know whether everybody knew about Kola-Ade or not, we knew it and advertised it. Stencilled it in our floor. I mean by the word trade "in the trade dope and koke mean a class," dispensers, owners and the public.

Deposition of W. M. Pollock, for Defendants.

W. M. POLLOCK.

Direct Examination.

Age, twenty-three; live in Nashville, Tenn.; have been here about five years; engaged in bottling business. We bottle all soft drinks and Coca-Cola and Pepsol. We bottle John D. Fletcher's Koka and Cola flavors. That is the only cola drink we bottle.

(Deposition of W. M. Pollock.)

The name of our concern is the Nashville Bottling Works. I have been connected with other bottling works. I have bottled other cola drinks. We bottled Coconola, Rye-Olo, Cay-Ola, Mi-Ola, Star-Cola, and bottled other drinks and I have had several samples of different drinks bottled at different places. I have heard of—I guess about 40 or 50, something like that, different cola drinks. I have known of other cola drinks ever since I have known anything about working at the bottling plants, that has been about eight years ago. I have been in the laundry business and I have worked in the bottling business ever since I have worked anywhere. I had a little restaurant; I was in that business about six months. I handled beverages there. I think I have handled Coca-Nola and Rye-Ola and I handled some bottled drink, bottled in Lewisburg; I do not remember what it was, some kind of a Cola drink, bottled there; I do not recollect the particular name of it, but they bottled some kind of a Cola drink. The color of the barrels I get the cola drinks in I am now bottling are red. I have gotten different cola drinks in red barrels; Gay-Ola was in red barrels when we bottled it if I am not mistaken; Coca-Nola was in red barrels I am quite sure. Diehl's Star-Cola is in red barrels. Almost all cola drinks I have ever bottled come in red barrels; Coca-Cola barrels are redder barrels, their barrels have a gloss; they use a glass instead of these cheap barrels; these other [923] drinks use a kind of cheap paint; the only ones I ever bottled used a kind of cheap paint and it made a dull

(Deposition of W. M. Pollock.)

color. I could tell the difference between these other barrels and the Coca-Cola barrel if I saw them together. I will tell you how I have got it down; at the house we buy all kinds of barrels and generally paint them over; take them back there and wash them off and taking and comparing one with the other, and looking at the difference between the paint of one and the other people use, they use a better paint than we do. We get our paint from Warren Paint & Color Co., a Nashville concern. We use amber color bottles. We did bottle a cola drink while I was at Shelbyville at the bottling works there in a lighter bottle, but the people did not believe it was a cola drink because we put up Ginger Ale and put up Cream Soda in the same colored bottle as that and they would not drink that, and we changed and got us a dark bottle to make it so people would think it was a Cola drink. We first bottled Rye-Ola in light bottles and put it in dark bottles later. We bottled so many other drinks and put them in light bottles that they did not think it was a Cola drink and thought we were putting something over on them. I have never bottled all the bottles I have bottled Coca-Cola and other bottles, and I have never bottled any Cola, any kind of a cola drink in a bottle the size they bottle the Coca-Cola Co's. stuff in. The size of their bottle, I think, is a 7 oz. bottle, the sized bottle we put our drink in is 7½ oz. bottle. There is not as much difference between them as there is between them and a beer bottle. I do not think a man who was not familiar with handling bot-

(Deposition of W. M. Pollock.)

bles could tell the difference, if he was not formerly handling bottles. The color of these different cola beverages are about the same, but there is a difference in the taste of all I ever tasted. I do not know whether you would call it a great difference or a slight difference; that is a difference in them. Some people cannot tell the difference but I can. You take lots of people that never did drink a Coca-Cola or Cola drink around out in the wilds or country, you could give them anything and they would not [924] know the difference, but a man used to drinking one particular brand I think he could tell the difference. When I was in this restaurant business I handled soft drinks. We handled a cola in bottles. People in asking for those drinks call them Colas. They would say give me a Cola. I never heard any of them say give me a Dope; if I did it has been some time ago and I have forgotten. I never hear them say give me a koke at that time, but I have heard it around the fountains and different places. I have heard Koke and Dope, well, mighty near ever since I can remember a Cola drink. I have heard Koke called more than I have dope. These words as applied to a soft drink I think they mean a Cola drink. That is what I mean when I call for them. I go into a soda-fountain and ask for a Koke or a Dope mighty near every day; I expect to get a cola drink. I do not expect any particular cola drink because it don't make no difference just so I get a cola drink; a caffeine drink. When I go in and ask for a Koke or a Dope, I do not consider

(Deposition of W. M. Pollock.)

I am making a definite and specific request upon the soda dispenser for Coca-Cola and nothing else. Just so he gives me a Cola drink to quench my thirst, that is all I care about. I am not particular about what he gives me. The people in ordering call for Cola and sometimes they use Koke. We have had written orders call it C-o-k-e. I do not know what you pronounce it. I have one at the house; I do not know, the secretary may have some more in his safe; I expect he has. I can get it as quick as I see the Secretary unless he gives me orders. I have had lady customers come into my place and ask for drinks; in asking for them they used Coca-Cola if they wanted a Coca-Cola, or Cola if they wanted a Cola. We had a customer here on Seventh Avenue, a lady, and when she calls at the house she tells me, now make it kind of heavy, you know how I want it; that is the way she takes it, she wants it kind of heavy. She wanted a Cola kind of heavy, said the Coca-Cola Company their stuff got so it was not any good and she wanted it kind of heavy, kind of biting. I would take it out and put a little more syrup to it; that is the way I fixed it up for her. I told her I would send out a box; she would know she [925] was not getting Coca-Cola, and our crown says it, and the bill goes with it, and she would see we do not bottle Coca-Cola. I do not regard Koke and Dope as meaning any certain one.

Cross-examination.

I am now bottling John D. Fletcher's Coca and Cola flavor. We have been bottling that drink all

(Deposition of W. M. Pollock.)

the year, I believe; we started in April but we did not get his trademark until here, I guess, a little before Christmas. From April to Christmas we just called it a cola. We have not gotten ours up to look like Coca-Cola. I work down at Fletcher's part of the time and down at our place part of the time. He is not interested in our place at all; I work at both places. In the bottling plant I bottle and make syrups; bottle on the bottling machine part of the time. In the winter-time I run the whole place. The president, secretary and vice-president stay in the summer-time. R. F. Davis is secretary of our place, J. R. Hill is vice-president, and G. R. Hill is president. It has been so long since I have handled Gay-Ola I do not know whether it was the same color as Coca-Cola or not but they were in red barrels when I handled it. I said we changed in bottling Rye-Ola. We changed because we were bottling so many drinks of the same color, cream soda, was the same color as Rye-Ola and Ginger-Ale was also about the color of Rye-Ola and people would not buy Rye-Ola because they thought it was the same drink. We had so many drinks just alike that we changed to make it in a bottle and get the people to buy the goods. I do not know why they did not buy the goods in that kind of bottle, they wanted a different kind; that is the reason we changed and got it into a different bottle, because the Murfreesboro people were shipping a substitute in a brown bottle, on the same order of the drink we were shipping. I think they were shipping Koke at that time. If a man

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makes a kind of a cola drink he claims it as a substitute to the other drinks; all these different drinks are substitutes to one another. That is what people call it; like Mr. Fletcher says at the house, they say there that people claim he is trying to make a [926] substitute for Coca-Cola; he is not, but he is trying to make something better. We changed the bottle because we had so many different drinks alike of the same color in the same kind of bottle; we changed for Rye-Ola, a kind of brown bottle. I changed to a smaller bottle; it was costing too much. Like people talk around here in some way, they say someone is getting up a substitute for Coca-Cola. I do not think a man who gets up a cola drink gets up a substitute.

Redirect Examination.

The reason why I think they call them substitutes, there is so many cola drinks out and the Coca-Cola Company advertised so heavy, that a man thinks, people think because if a man gets up a cola drink he is trying to get up a cola drink to substitute for the Coca-Cola Co.'s drink, that is the reason I think I do not consider that drink I am putting out a substitute to Coca-Cola, I do not consider Star-Cola a substitute to Coca-Cola. I do not think the people consider my drink a substitute for Coca-Cola. I have gone out to the base-ball park.

Mr. HIRSCH.—I do not think that is a proper subject for redirect examination and we object to it on that ground.

(Deposition of W. M. Pollock.)

Objection overruled and appeal prayed and granted.

They serve Diehl's Star-Cola there in bottles. I have drank it out there. I always say give me a Koke or give me a Dope, that is what I say at places like that, and they serve me Star-Cola. I do not think I am getting Coca-Cola when they serve that to me. I know I am not because the boys don't holler that, and then there is advertising on the crown. They holler Diehl's Star-Cola.

Deposition of J. C. Price, for Defendants.

J. C. PRICE.

Direct Examination.

Twenty-two years of age; business, soda dispenser. I am running a restaurant now, been in the restaurant business for the past four months. I was soda dispenser for about six years. There are many different brands of cola drinks I have served, I could not call them all, I know a few, Arrow-Cola, J. D. F. Cola, Koke and Cola, Gy-Ola, Afri-Cola, and I have dispensed Star-Cola and Gerst's Cola, too, and Coca-Cola. [927] I have worked here in Nashville, St. Louis, Evansville and Birmingham. At these different towns I sold different cola drinks. In St. Louis I had the Coca-Cola, the genuine Coca-Cola and another cola. When customers came in and asked for a Koke or a Dope I sold the competing drink. If they asked for Coca-Cola I give them the genuine Coca-Cola. We served the competing drink because we felt like they did not want the genuine, if they

(Deposition of J. C. Price.)

had they would call for it by the full name. The words Dope and Koke mean, in my opinion, a cola drink containing caffeine. I have had customers come in and call for a Dope and call it its name, for instance, J. D. F. Cola, or Koke, and Kola, they would prefer it to the Coca-Cola. The last place I worked in Nashville was S. W. Harvey, 303 Broadway. We dispensed there J. D. F. Cola and Koke and Cola, made by John D. Fletcher. Those different cola drinks were served when Koke and Dope were called for by customers. We handled Coca-Cola at that time and customers asking for Coca-Cola were served the genuine Coca-Cola. I do not know whether or not any of our customers in calling for Koke and Dope knew they were getting a different brand of drink from Coca-Cola, but they all seemed satisfied. Very seldom I ever had a man turn it down and say it was not the genuine—I mean a man come in and call for a dope and it was very seldom that I had a man go away dissatisfied. The taste and color of these different cola drinks is almost the same. I have been out to the ball park here, they sell and advertise Star-Cola out there. I have heard people out there, patrons, asking for Dope and Koke. I have hollered at the boy to give me a bottle of Dope, I call it Dope, he would give me Star-Cola. You could tell by the bottle they were not giving you Coca-Cola. It says Diehl's Star-Cola on the bottle and on the crown. A traveling representative of the Coca-Cola Company called when I was at Mr. Harvey's, I forgot his name, came where we were working at Mr.

(Deposition of J. C. Price.)

Harvey's and called for a Dope, he did not call for it by Coca-Cola. I gave him the competing drink and he said it was not the genuine and asked what I was doing with a competing drink for Coca-Cola syrup in the container [928] marked Coca-Cola. I told him that did not have anything to do with it, that while the manufacturing company made that fountain and labeled the jars, I thought I had a right to put it anywhere I pleased. On the fountain, it was a double fountain, worked by two men, and there was but one man. You understand there was a syrup container for Coca-Cola on the right-hand side and on the left-hand side a Coca-Cola container, and on the right side I had Coca-Cola and on the left side I had Coca and Cola, and he came in and called for a dope and I give him the syrup on the left-hand side. Coca and Cola made by John B. Fletcher. I would know the gentleman if I were to see him again. That looks like the man there—(indicating Mr. Herr.) He said it was against the law to put a competing drink in a Coca-Cola syrup container. I told him I felt I had the right to put the syrup in any one of the containers I pleased because we had paid for the fountain. I never substituted this competing drink, J. D. F. Cola, when Coca-Cola was called for. The brand of the drink I had on the left-hand side was Coca and Cola made by John D. Fletcher, the same thing as J. D. F. Cola. These various drinks I have referred to most all came in red barrels. The Coca-Cola Company had a barrel that was very close to it, the paint was. The Coca-Cola Co.'s barrels look to be a darker

(Deposition of J. C. Price.)

colored red. I do not think I could tell the difference just at a glance. I go into soda-fountains myself and ask for a Koke or a Dope. I expect to get a competing drink if they do not handle the genuine. I do not consider when I go into a soda-fountain and ask for a Koke or a Dope that I am making a definite and specific demand upon the dispenser to give me a Coca-Cola and nothing else, because if I wanted a Coca-Cola I would ask for it when I went in.

Cross-examination.

All these cola drinks are about the same taste and about the same color. About all that I have seen were shipped in red barrels. By competing drinks I mean these drinks, other cola drinks which are sometimes spoken of as substitutes. [929] Coca-Cola is the genuine cola drink, that is the product made in Atlanta. This Coca and Cola is the stuff Mr. Fletcher put out, he put it out as J. D. F. Cola and then changed the name to Coca and Cola. He put on the crown John D. Fletcher's Coca and Cola flavor. That was what was in the Coca-Cola container at the fountain that the Coca-Cola representative Mr. Herr objected to. The container has a porcelain screw top, Coca-Cola. I had this conversation with Mr. Herr last Spring, 1914. I do not remember what month it was. It looks like the gentleman, Mr. Herr, a tall heavy fellow. I could not be perfectly sure because it passed from my memory, but so far as I recollect it was him. Those competing drinks cost the dealer less money than Coca-Cola and there is more profit in it. When a man comes in and asks

(Deposition of J. C. Price.)

for a Koke or a Dope and if I have any of the competing drinks I give him the competing drink, but if I have not got the competing drink I give him the genuine, but if I have both I give the competing drink because I can make more money on it.

Redirect Examination.

I do not consider when a customer asks for a Koke or a Dope that he has asked specifically for Coca-Cola.

Deposition of Mat Wilson, for Defendants.

MAT WILSON.

Direct Examination.

Fifty years old; live in East Nashville; lived here all my life with the exception of three years I was down the country, when I was a little orphan boy. I have a drug-store located on corner of Third Avenue and the Square, in Nashville, Tennessee. I have a soda-fountain in my drug-store. I dispense eight or nine different kinds of drinks. I dispense Gerst's Cola. It looks like Coca-Cola and I never did see any difference in the taste. I am no expert on the taste because I would not drink but dog-goned little bit of it. I do not handle any other cola drink. Customers coming in and asking for that drink ask for a Dope, give me a dope. I serve them in response to that request, this Gerst's Cola. When customers come in and ask for a Dope I do not consider they are making a definite and specific request for Coca-Cola, if they did they [930] would ask for Coca-Cola. I have had some few ask for Coca-Cola and

(Deposition of Mat Wilson.)

I would tell them I did not have it, and they would say, give me some of that other Dope. Before I went into the drug business I was in the saloon business. Ever since I can remember we handled cola drinks there. This Gerst's Cola, I had the syrup and made it just like I do now, made it from the syrup drawn from a spigot by adding carbonated water. Customers used the name Dope asking for it there. Some did not know what it was; they would say it is better than I can get at a soda-fountain. I said, "This is Gerst's." Then they would say it is better than I can get at a soda-fountain. I would say, "Well, call again then." Then I have had this Mr. Sidebottom down here, who didn't drink any whiskey; he would want his Dope, and he did all his drinking at my place, because he said it was better than he could get at the soda-fountain. Dope means, as applied to a soda-fountain drink just some slang word; I imagine that just sprung up, that is all I know. I have had people come in when I run a saloon, just pass the word, and ask, I want some whiskey, and say give me some of that Dope I have. I knew what they wanted, and I would give it to them, and especially when prohibition first started up here. I was the one who broke the ice for them all. They arrested me 36 times one day. That's right, I was not *bottleggin* at all. I tried to get my license, and they would not give it to me, so these boys, they named my place soft drink stand #1, and they all opened up when *Up boat* the cases next day. And I only had a little of this junk down there, no whiskey at

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all; I only had a jug that we were using and I knew they were after me before that, and I laid her away from them, and, finally, I got into the game, too, but I was using all of this dope, they call it, Gerst's stuff and Beerette and all of that stuff that would blow you up, and finally I eased back into this game and called all of this stuff Dope. They would come in and say, give me some of your Dope.

Cross-examination.

Dope could be whiskey or anything else. If they would come in and say [931] give me some Dope, I knew what they wanted. You would not have to knock a man down to know what he wanted; and he did not want to come out and say anything there, and I knew what they wanted, and they would ask for a dope, and I would give it to them. I never have handled Coca-Cola in my life. I just don't fancy it; don't like it. I understand the Coca-Cola Company put \$10,000 in here to work this prohibition business; I said, "Damn thèem, I would not buy any stuff from them, and never did buy any stuff from them." When a man comes into my place and asks for a Coca-Cola, I tell them I have not got Coca-Cola. I tell them I have Gerst's, and very seldom they will walk out. I have boys at our fountain. I do not know that when people come to my fountain and ask for Coca-Cola, Koke or Dope, they are all served out of the same container; if the boys do serve them that way, I tell them not to. I stayed behind the counter when I ran a saloon.

(Deposition of Mat Wilson.)

Redirect Examination.

People did not ask for Dope much before prohibition.

PRESENT ON BEHALF OF THE COCA-COLA
COMPANY.

Messrs. HARROLD HIRSCH and EDWARD S. ROGERS, Attorneys for the Coca-Cola Company, and Mr. PIERCE, also for the Coca-Cola Company; Mr. A. B. LITTLETON, Attorney for the Koke Company of America, and Others, and Messrs. W. F. NORMAN and J. C. MAYFIELD, on Behalf of the Defendants Herein.

Mr. HIRSCH.—We have asked for the rule as to the witnesses.

Mr. LITTLETON.—He is a defendant (referring to Mr. Mayfield).

Mr. HIRSCH.—I am going to find out who he is.

Mr. LITTLETON.—He is a personal defendant.

Mr. HIRSCH.—And also to see whether he represents any of the corporations.

Mr. LITTLETON.—Yes, he is present also on behalf of The Southern Koke Company, Limited.

Deposition of H. C. Groves, for Defendants.

H. C. GROVES, witness on behalf of the defendants.

Direct Examination.

I was born in 1866; reside, Ocala, Florida. Lived there since '87. [932] Engaged in the drug business since '89. I have had a soda-fountain in my establishment since 1889. I know J. C. Mayfield. I knew him when I was manager of the store, in the

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spring of '88; I first met him at my store in Ocala, Florida; it was not my store then; I was managing it. He was soliciting for cola drinks at that time, trying to sell me cola drinks. The name of that drink was Koke, K-o-k-e. It was an extract of Coca and Cola leaves; he was selling an extract, I made the syrup. The color of that syrup was a dark-brownish. I have seen Coca-Cola syrup. I judge they are just the same, this Koke and Coca-Cola. I made a drink out of it, and drank it. It had a slight bitterish taste just like Cola leaves and Coca leaves extract. It tasted sweetish, something very similar to the taste of Coca-Cola. I bought some of it at that time, a very small quantity, as I can remember it, a quart; he shipped it to me in a quart bottle. The label on the bottle just said Koke extract and the directions for making the syrup. I next saw Mr Mayfield when I was making a purchasing tour in the latter part of the year, purchasing for my fall trade. In making that purchasing tour I went to Atlanta, on the way to Chicago, through Atlanta; when I got to Atlanta I saw Mr. Mayfield; he was the only one I know. I went to his office. I knew where his office was then, but I do not know now. When I went there I told him I had tried out the extract and gave him an order for some more. He seemed to be doing pretty well with it. He sent me more after that, and I continued to handle it up to date, continuously from that time up to date. I did not always get it in Atlanta. I bought it from Atlanta from the Pemberton Medicine Company at

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Atlanta that I got it from, and then Mr. Mayfield seemed to form a company, Mayfield Manufacturing Company, what I remember; it was at Birmingham at one place, and Nashville another, and I got some from him in St. Louis. I get it from him now at New Orleans. The name of that company is The Southern Koke Company, I think it is, Limited, something like that. The receptacles I got this product in first came out in small packages, the extract I got in quarts, quart bottles, and, as a general rule, I got [933] jugs of extract and then he got to making the syrup up and putting it in barrels; I am buying it in barrels now. The barrels are painted some reddish color. At first it was just a shipping tag with the labels on them, nothing on the bottle except the directions and what it was, Koke extract, and directions how to make it. Later on they had a small label on the barrel, just the word Koke is all on that label. There was one representative of the Coca-Cola Company called on me the last year or so, he just came there to put up some Coca-Cola advertising matter and I told him that I did not want that Coca-Cola advertising up, that I was not doing any advertising for the Coca-Cola drink, and that was all he said to me then, and I told him at that time about the other. He came back afterwards, and asked me for a sample of what I was selling and I told him—I gave it to him and he went away and said, “I am going to make it hot for you,” just that way, and, I said, “I do not understand how you can do that. I am not selling Coca-Cola; I do not see how you can make it hot for

(Deposition of H. C. Groves.)

me.” He intimated I was trying to sell something else instead of selling Coca-Cola, and intimated to me that I had no authority to sell anything else but Coca-Cola. I had not been substituting as a matter of fact. He said, “Well, you will hear from me in this matter” He did not tell me how he was going to make it hot for me; he gave me his name, but I cannot remember it right now. A man by the name of Peace called on me; he claimed that he came down there ostensibly to buy me out, that was the first thing, I found out afterwards Peace was supposed to be a detective or something of that order for the Coca-Cola Company. Peace came to my store, and he began the talk. He said, “I have been looking around for a place to invest,” and wanted to buy me out, and, of course, I was anxious to sell. I said, “Why, I have a good thing here,” one of the first things I said, and I said, “I have the A. G. S. contract to sell in this case, and I make five to six hundred dollars on that, but I pushed that.” And while he was there the mail brought in a bill from the Southern Koke Company, and I said, [934] “Here is another good thing I have got. I do not sell Coca-Cola, and have not had any for four years, because Mr. Miller of the Coca-Cola Company made me mad, and, in addition to that, I can make more money selling Dope and Koke, and I have got the people educated up to buying Koke and Dope in this town, and told him that at that time I was not selling Coca-Cola, but, of course, went on about the other things in the store. While I was standing there, he asked for a drink of

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Coca-Cola. I said, "Well, we don't sell Coca-Cola. I will have to give you Dope." He gets Dope and drinks it. And then afterwards he made information against me, and in the information before the United States Court, he said, that I told him I did not sell Coca-Cola. By this information, I mean a lawsuit the Coca-Cola started against me for something. I do not know what it was. These agents intimated that I would be sued by the Coca-Cola Company. That was the information I got from them and from all the neighborhood around there, I was going to be sent to the penitentiary for some great crime I had committed. They did not tell me I had been doing anything. They tried to show that I was, but did not tell me that I had been doing anything. They give me no reason for their hostility towards me except they were going to make me sell Coca-Cola. We agreed in the suit for the temporary injunction.

Mr. HIRSCH.—I object to the witness stating the results. The decree is the best evidence thereof.

Exception overruled and appeal prayed and granted.

In the suit the Coca-Cola Company presented their case, witnesses and all, and we just submitted to the judge without any argument or witness or anything, of course, conceding that we let the Coca-Cola Company have an injunction against my selling Coca-Cola, because we were saying right then that we did not sell Coca-Cola and did not substitute for Coca-Cola. I sold out the business the first of January, for the reason that the tampering and charging of

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these detectives and Coca-Cola representatives got the impression there in town that I had committed some grave crime, and the people there in town thought I was going to be [935] sent to the penitentiary for something I had done. You see these folks, Peace and the other young man, went around town talking about the business and the misrepresenting we had been doing, and got the impression in town that I had been substituting not only in soda-water, but drugs and everything else, and ruined my business, and I thought I had better get something for it, and I sold what I had.

Cross-examination.

I sold out for the reason that the business was going down, and the substituting was the only thing I could hear. I sold out to protect myself. I continued in my business from the time that temporary restraining order was issued and entered into until the first of January, 1915. This temporary injunction entered against me was in June or July. Our side did not offer any evidence. I do not know what I was charged with; I did not read the bill. I had an attorney. I suppose my attorney read the bill. We told the Court we did not care at all for the restraining order and the restraining order was issued, that I should not substitute anything for Coca-Cola, that was all, so far as I know. I did not understand I was charged with substitution. I told you I did not understand I was being charged with anything. I don't think I ever saw the decree.

(Reading.) "This case coming on to be heard

(Deposition of H. C. Groves.)

upon the motion of the plaintiff for a temporary restraining order and the defendant, having filed his motion to dismiss the bill of complaint, and the same having been argued and submitted, it is ordered, adjudged and decreed that said motion to dismiss be and is hereby denied and submitted.” I do not remember having entered a motion to dismiss the bill, my attorney did that. I employed an attorney to represent me.

(Reading.) “And said motion for temporary restraining order upon the bill of complaint and the affidavit filed in support thereof having been argued and submitted by counsel for the respective parties—”

I do not remember my counsel arguing the case. All he did he said, we submit to it. That was his argument, if that can be called argument. [936]

(Reading from the decree again.) “It is ordered, adjudged and decreed that the defendant, Anti-Monopoly Drug Company, a corporation, its attorneys, officers, servants, employees and representatives be, and each of them is hereby restrained until the further order of this court from infringing upon the trademark Coca-Cola, and the trade-rights of the plaintiff herein, and from substituting, passing off or permitting the sale of any product when Coca-Cola is called for that is not the product manufactured and named and sold by the complainants in this cause, and from applying to any syrup not manufactured by the plaintiffs, the name Coca-Cola or from applying any other word or words that is a

(Deposition of H. C. Groves.)

colorable imitation thereof, and from using any name, whether nickname or otherwise, similar to the name Coca-Cola, as applied to any product, so as to cause any misrepresentation or deceit. Done and ordered this 23d day of June, 1914, by Judge Call.”

Mr. LITTLETON.—I wish to enter an objection to that question and the questions he has read from this paper, because the decree is not in evidence, and there is nothing in the evidence to show what the paper is that he is reading from.

Exception overruled and appeal prayed and granted,

I think there was a decree entered against me. I made no objection to the entering of that decree, because I was not doing it, substituting and passing off. All that there is in that decree I was living up to before the decree was ever entered; that was the reason for not entering any objection to that decree. I was not doing it. The Court did not find that. The Coca-Cola Company offered to throw the whole thing out, if I would go on, through your attorney Mr. Bufford—Bufford & Reynolds; I got a letter from Mr. Bufford and I got a letter from Mr. Reynolds, too. He said that we would not, that it was not dismissed; that he would dismiss it if we would submit to it before the temporary injunction was given, if we would submit to that, and would waive damages, and ask that the words color be stricken out of that decree. That did not go through because the judge did not allow it. The Coca-Cola [937] Company would not agree to strike “color” from the decree. I

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did not agree to it myself. The Coca-Cola Company offered to waive damages on the permanent injunction, and I kicked on the ground that the word color was in there, and the Coca-Cola Company would not agree to strike it out, and the decree is not worded any different yet.

When Koke and Dope are called for I sell Dope and Koke made by the Southern Koke Company, the Southern Koke Manufacturing Company. They are located at New Orleans. I have not had any Coca-Cola in my place of business for three or four years. Within that time when a man came into my place of business and asked for Coca-Cola, I told him I had none. This is as truthful as every bit of testimony I have given this morning.

Mr. LITTLETON.—I wish to enter an objection to the counsel attempting to bully the witness.

Exception overruled and appeal prayed for and granted.

I had a sign on my fountain that I did not sell Coca-Cola. It was generally known there that I did not sell Coca-Cola. Every statement I have given is true. I sold out to J. G. Parish. That representative of the Coca-Cola Company that called on me and made those statements about, "You will hear from me," was Satterfield. He represented to me that he was with the Coca-Cola Company. I do not remember how long I have been getting these barrels that had this K-o-k-e on it. They come, some from Birmingham, some from Nashville and I think one or two from St. Louis and some from New Orleans.

(Deposition of H. C. Groves.)

Sometimes Koke was stenciled on the barrels and sometimes a printed label was stuck on. I cannot write down here exactly the way that appeared. I do not remember whether it was in black type or fancy type. I remember K-o-k-e was on it. The jugs had labels on them. The barrels some had Koke stenciled on them, or labeled on them, and I have known some with K-o-k-e and D-o-p-e on them the same as other things.

I first met Mr. Mayfield in the Spring of 1888. At that time [938] he was selling cola drinks. Mr. Mayfield represented to me he was selling a new drink, the name of the new drink he told me was Koke. I ordered a quart on a guarantee sale to try it out. It came in quart container bottle. A round tall bottle, it had a cork in it. The label on this bottle was K-O-K-E extract, and the directions for making the syrup from the Koke extract. I do not know how this word Koke was placed on there, It was printed, I remember it had Koke on it, but I do not remember how it was written. I do not know anything about type, I know it was printed.

Q. 268. I present you here something made with pencil. It is not printed, but you say what you had was printed; I ask you if that name K-o-k-e right there, did it appear like the first one or like the second one? I think it appeared like the first one. It was just printed on there, that is the place it was printed, that is what I call printing. I do not remember about the shape or color of the label. When the label comes to me it is mighty dirty, it comes

(Deposition of H. C. Groves.)

through the freight. The syrup was spilled on the label on the bottle, that bottle came by express, the Southern Express Company. I do not remember whether I bought any more Koke after that before I saw J. C. Mayfield again. I came to Atlanta in the Fall of 1888. I was going on through I did not go to any hotel, I went to Mr. Mayfield's office, I do not remember the street. I told him I was doing pretty well with his extract, just as a casual caller and bought some more, just another quart. I did not see the container, I did not go back to Ocala. I was on my way to buy goods. Sometimes I would go through Louisville and on up to Chicago and perhaps come around by New York, home, that was in the Fall of 1888. I bought goods in Louisville from Arthur Peters, and from A. S. Maxwell, in Chicago. We had the same name we have now, the Anti-Monopoly Drug Store, located in Ocala, the same as we are in right now. At my sale in January I just sold my stock out. I just gave orders as we needed it after that. They come in different style packages, some of it came in a one-gallon jug. It did not have a [939] label, it had a tag tied to it with just Koke on it, the same as the other. It was printed, is all I know. I think it was black, a printed label; a cheap label, that was all, a label in drug parlance, it was tied on with a string. 1888 is when we started in selling it. I do not remember distinctly when the jugs came to me from Birmingham or Nashville, but about 10 or 12 years ago. One or two came from St. Louis. I think the last two or three years they

(Deposition of H. C. Groves.)

came from New Orleans, Louisiana. I got them from Atlanta 7 or 8 years, then from Birmingham or Nashville, Birmingham first. I could not say positively how long, 4 or 5 years maybe, about the same length of time from Nashville and then a few from St. Louis up to the time I got them from New Orleans. This Chicago house I did business with, S. A. Maxwell, we bought stationery from them, drug sundries, etc. They had a drug and stationery house. The name of the concern that shipped me this quart in 1888, I understood, was the Pemberton Medicine Company, and they continued to ship me all the time that the shipments came from Atlanta. So far as I know the firm name after the shipments came from Birmingham and Nashville was Mayfield Manufacturing Company. I do not remember the name in St. Louis, I think it was the same, and from the Southern Koke Company of New Orleans. I first heard of Coca-Cola I think about the same time; I won't say for sure. I do not remember of Coca-Cola in 1888. I thought his Koke was the first cola drink that came out, it was the first one that had come to my notice. I was not handling Coca-Cola at that time. We have handled Wine of Coca ever since we have handled anything; that is a medicine, I think. I do not remember who got it out. I never heard of Celery-Cola. I had a Lippincott soda-fountain in my store in 1888. That was a very crude fountain, we used dispensing bottles. We had the bottler fill out tanks for us with carbonic gas. E. C. Smith was the bottler there then, there were

(Deposition of H. C. Groves.)

others but I did not deal with them. The first fountain was a counter and had a gas tank on it and receptacles to set bottles on, and had surfaces on them to put labels on the bottles to tell what we were [940] selling, an advertisement was on the bottles to tell what we were selling. O. H. Koehline was the owner of the store in 1888. He was a tubercular patient and was almost gone when I got there. His brother William worked there at that time, he is dead. Julian Probst worked there, he is dead. Robertson was the name of one of the porters there then, he is dead. Jack Fillin is another, he is dead, too; all who worked there while I was employed as manager are dead except myself. I worked there as manager 19 months or about 2 years. I bought it out. I had a good many people work for me. The first was E. W. Harrison, he died long ago; then J. B. Carlyle, he is down there in the drug business now. He made an affidavit for the Coca-Cola Company that he sold Coca-Cola extravagantly now. Another was Ernest Mills, he is in Memphis; I do not know who he is with. Miss Moore worked there for me. I do not know her initials, she is in Ocala, Florida. I do not think she is working for anyone now. Albert Miller worked for me, he is out west somewhere. There were others but I do not recall them right at this minute. I got three barrels from Nashville, some were labeled and some were stenciled, but all had this "Koke" on it. The patent medicines or proprietary medicines I was handling in the Spring of 1888 were Hood's Sarsaparilla,

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Fletcher's Castoria; it was not labeled Fletcher's, just Castoria, but it had his signature on it. And Widder's Spruce Tonic, and Armstead's Tonic, and some Chill Tonic, too, I remember. I do not think we had any extracts. Others were Tilden's Condition Powder, made at Pulatka; Schellenberger's, there are lots of them if I could sit down and think them over. I had a brand of cigars at that time made right there in Ocala, Kiser's cigars. Before I went to the place in the Spring of 1888, I was attending college in Chicago, The Chicago & Illinois College, it was on State Street, I think, south of the river, I could not tell the number, near Harrison Street. That was the Chicago College of Pharmacy, This Illinois College of Pharmacy is the same thing, near Clark and Wells Street. I started [941] to attend in 1884. I went to Chicago College first, I think I went through one course. I was relief clerk, wherever they called me, in through Illinois. I worked once or twice as relief clerk for a week or two for Gail and Blocky; one time in the Palmer house store, the other time I think on Clark Street. The Palmer store faced on that side street in the Palmer House. That was in 1885. Those colleges required four years course and practical experience. I graduated, I think, in the Spring of 1888 from the Illinois College of Pharmacy. I was at work before I got my diploma in Ocala. I went from the college to Ocala. When I worked as clerk at Blocky's I was not around their fountain at all, I filled prescriptions. I received notice that I was going to

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be subpoenaed to come here and testify in the case and they asked me whether I would come or not. I was informed by letter. I do not remember whether it was from the attorneys or who it was from. I did not keep any letters, I was first informed a short while ago. I do not keep any correspondence of any kind, I do not try to. I have not any from my business back in 1888. It has all been destroyed I guess; I do not know whether they are down there or not. I did not try to keep books, I tried to do entirely a cash business, I never kept books. I just told them I would come without being subpoenaed, I asked them to advise me when to come. The name of my attorney in this case of Coca-Cola Company against Anti-Monopoly Drug Company was Reynolds and something at Jacksonville, Florida. I paid them \$106.00. I never was reimbursed for the \$106.00. I don't know whether this firm of lawyers communicated with the the defendant, Southern Koke Company, or any other of the defendants, or Mr. Mayfield about the decree, preparing the defense of this case or anything else. They never said a word about it to me if they did. Some of the wholesale drug firms in Chicago when I was at the Illinois College of Pharmacy were Hymater Taylor & Company; Morris & Palmer and Peter Van Skaack. That is about all I remember now. I did business with Peter Van Skaack after I went to Ocala. I think I first commenced [942] handling Coca-Cola shortly after I bought the store. I was handling Koke at that time too, when a man

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came at that time and asked for Coca-Cola I gave him Coca-Cola, and if he asked for Koke I gave him Koke. Down in our section Dope is just coming in, just being advertised. I think I helped advertising that myself. This Koke Company makes Dope. Koke and Dope are the same syrup. I have heard the name Dope before it has been used there applied to these soda-fountain drinks. Sometimes Dope is a headache powder. I first heard dope applied to soda-fountain drinks prominently the last two years. I do not know as I ever had heard it applied to soda-fountain drinks before. The word Koke is applied to this drink I get from the Southern Koke Company, that is the only way I ever heard or understood it.

Mr. HIRSCH.—We wish to say we will present a certified copy of the decree entered on the 23d day of June, 1914, by Judge Call, a copy of which we have read from. We ask time to have it certified, A certified copy of the bill, and a certified copy of the decree and a certified copy of the record, of the evidence, and everything in the case.

Mr. LITTLETON.—Of course I will enter an objection to anything except the bill and the decree because nothing else was brought out against that and it is entirely irrelevant.

Exception overruled, and appeal prayed and granted.

Further deponent saith not.

Deposition of T. H. Lever, for Defendants.

T. H. LEVER.

Direct Examination.

Twenty-eight years of age; residence, Spartanburg, South Carolina. Lived there four years; engaged in drug business; have been engaged in the drug business about eight or ten years. Was in business before at Columbia. I have a soda-fountain in my drug-store; I have one in the store at Columbia also. I dispense at my soda-fountain a general line of drinks. I handle the Dope and Koke and Coca-Cola. I know a number of others, Mi-Cola, Ko-Nut, Rye-Ola, Gibb's Cola—that is a new one just became acquainted with yesterday. I have known of Cola drinks [943] ever since I have been in the drug business, about eight years. These cola drinks are almost the same color with a few exceptions, and just about the same in taste. The first lot of Koke and Dope I put in was long about in August, 1914. As a rule my customers come in and call for the drink they want sometimes, and then at others they will come in and say, "Give me a drink"; sometimes they will say, "Give me my dope" and any kind of—making sort of an application for a drink without designating just what they want. On a good many occasions I have had that. My drinks have been called for like that. The ones that know I handle Dope are acquainted with this special preparation and they expect to get it, at least I have never had any complaint. It has never

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been in a secret way for they all know about it, and when they come in and call for this Dope I give them that. I have had them come in and point at the bottle of capudine and say, "Give me my dope," or I have had them point at Bromo Seltzer, Celery Caffeine or any of those headache salts, when they kind of establish themselves with a certain drink at the fountain, and in a good many instances when they come in they do not call it by its proper name, but "Give me a dose of my dope." With respect to drinks at the soda-fountain I have got a lot of customers that come in and call for grape juice under the name Dope. A few days ago I had two farm boys come in and call "Give us a couple of dopes," and one turned to the other and said, "What will you have?" He said, "I will take grape juice," and he said, "I will take the same." These fellows evidently did not know there was any special drink I was selling at the soda-fountain under the name of "Dope" but had heard in a general way that dope was sold at soda-fountains. Most of my customers come in and call for Coca-Cola, call for "Coca-Cola"; those that are acquainted with the other drinks and call for Dope, want Dope, but most of them that drink grape juice call for grape juice, and with a few exceptions I have had them call out different drinks at the soda-fountain and apply the name dope to it. I had some Ko-Nut on hand at one time, but that was before your drink Koke and Dope came out, [944] Customers in asking for that drink Ko-Nut called for Dope and I gave

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them Ko-Nut. The word dope means to me as applied to a soda-fountain, more of a nickname than just any drink that a customer is acquainted with, more of a nickname for just any drink that a customer is acquainted with and when he gets acquainted with soda-fountain men, we usually know those fellows when they come in, it might apply though to hot chocolate. I have had ladies say, "Give me my dope" when I know what they wanted, they wanted chocolate, chocolate milk, because they were in the habit of drinking chocolate milk at certain times of the day, for instance, early in the morning when they wanted something nourishing they called for "hot chocolate" and applied the term dope to it. If a stranger came in my store and asked for Dope, I would give him Dope. I might be serving him something he did not want if I gave him anything other than Dope. Before I handled this product Dope and at the time I handled other cola drinks I understood customers wanted a cola drink when they came in and asked for Dope. I did not consider it designated any particular cola drink, and very often I would ask them to designate the kind of drink they wanted. I am not around the soda-fountain so very much but that has been the rule that is carried out at my soda-fountain, that is my instruction to the soda-men, and my other men in the store. I have been around the fountain enough to know the names my customers use in asking for drinks and to know what they mean when they ask for those drinks. I told my customers I

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had two syrups there, one was Dope, known as Koke and Dope, and the other Coca-Cola. They were competitive drinks and most of the customers that I,—special friends of mine—like our drinks, this Dope, because when I introduced it to them by handing out a sample they liked it all right; it satisfied their taste and seemed to be what they were looking for. Before I handled this drink Dope, when a customer came into my store and asked me for a dope I did not consider that he had made a definite and specific request on me to serve him with Coca-Cola and nothing else. I have been handling Coca-Cola ever since I went into the drug business.

[945] I have not always handled some other cola drink along with it during that time. Coca-Cola syrup is not always uniform. It seems to be lighter in weight and lighter in color sometimes; I noticed that by the mixture in the glass, and have to use possibly just a little more to make a drink at other times. Most always the syrup is about the same in taste but I am not that well acquainted with it, I do not think, to give that as information. We mix our syrup with carbonating water before serving at the soda-fountain. There would be a difference in the drink if one glass was filled with water charged with about a hundred and forty, and the other glass filled with carbonated water, charged at about a hundred pounds. The one with one hundred and forty pounds would be a little sharper, more acid taste, and the one at one hundred pounds would be slightly flat. My attention was called to one bar-

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rel of Coca-Cola and there was a small substance coming out in the pan we were drawing it out in, and when the barrel was emptied I knocked the head out and investigated it and found in the barrel about possibly 8 or 12 ounces of a gelatinous looking substance, about the consistency of jelly, and tasted something like apple jelly, and right pleasant to the taste, and well, more like caramel, or something that possibly had precipitated in the syrup, sugar, something like that. It had a very pleasant sweet taste, with that exception, Coca-Cola has been about the same in that respect. This was precipitated. I am a practical druggist. I concluded it must have been slightly cooked too much, might have been the syrup, possibly some essential oil; I do not know if there is a certain essential oil used in Coca-Cola, it might have been something like that went down through the syrup and formed a jelly in the bottom. It really was a small amount for the quantity of Coca-Cola that was in the barrel. I do not know what condition would cause that precipitation to form, not being acquainted with the formula of Coca-Cola. A Coca-Cola representative called on me some time ago. I had a Coca-Cola representative to call on me to investigate this special syrup, Koke or Dope. [946] I informed him that I handled this, that I thought in doing it I was handling a legitimate syrup. I did not see anything wrong with it and that I was selling it for what it was called for, the name. Well, this gentleman did not state any more, but later, just several weeks after that, possi-

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bly six weeks after that, a special representative of Candler, Hirsch & Thomson, as his card indicated, came to me. Q. I will show you a card which we will mark "Defendants' Exhibit No. 8," and ask you if that is the card? A. That is the card, or one identical to it. I mailed that card into the Central Koke & Dope Company of Chattanooga. This gentleman approached me about 9 or 10 o'clock I think it was in the day. I was standing about in the middle of the store. Well, he walked right up and started by me, and I asked him if there was something I could do for him. He said, "Are you the proprietor?" I said, "Yes, sir." He said, "Well, I want to talk to you back here." I said, "No, this will be all right, right here." There was no one in the store but a little fellow and I did not care to leave the front of the store. He said, "Well, I am here representing Candler, Hirsch & Thompson of Atlanta in the interest of the Coca-Cola Co.," and he said, "We have a suit against you in the Federal Court." I said, "Well, what is the suit?" He said, "Violating the Pure Food and Drugs Act by substituting a drink for Coca-Cola." I said, "Well, that is the Coca-Cola Company's privilege. They can sue me. I do not feel like I have done anything, however. I do not feel like I have substituted and they can sue me if they want to." He said, "Well, the only way you can get out of that suit is to sign an agreement not to handle anything but Coca-Cola." I said, "If you came in to talk to me about that you can just leave the store." He

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said, "Good day, sir; we will just sue you." Well, later in the evening I was called up over the telephone by a gentleman that I bought goods from and this gentleman told me that this man told him that he was going to sue me, that he had a suit against me; he did not tell him anything about the agreement. Well, I said, "Yes, he told me the same thing." The next morning the [947] wholesale cigar salesman, who runs a retail place and a soda stand, called on me to get my order, and he told me the same thing, and he said that he told him that he had already had a suit against me and he wanted him to sign that agreement to handle nothing but Coca-Cola, that is Mr. H. B. Pierce, special representative of the Coca-Cola Company. I said, "Did you sign it." He said, "Yes." I said, "Well, I didn't. I do not think he has got any case against me inasmuch as I have not infringed on the Coca-Cola Company's trademark," and I said, "I did not sign the agreement." Well, I did not see his agreement; I do not know what it looked like. I never read one but I was offered one yesterday by a friend druggist to read, but I told him I did not care to read it. This conversation with this representative of the Coca-Cola Co., was carried on in a kind of a loud manner. He used kind of loud language in explaining his proposition to me, and I did not exactly like the way that he had approached me. I did not care to talk with him any longer, so I just dismissed him. I had not been substituting any drink for Coca-Cola. This representative after he

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left my place called on most of the trade in the same manner. I had reports on that without investigating it, from men that told me this—they said he acted in every—

Mr. HIRSCH.—I object to what other party told him.

Objection overruled and appeal prayed and granted.

A. He said that the—the man that told me this, said that he talked in a very forward manner.

Mr. HIRSCH.—I object to the answer as to what people told him as being incompetent evidence and move to strike the same out, and secondly, it being hearsay and conclusion.

Objection overruled and appeal prayed and granted.

What this Coca-Cola representative told me got about town so that it was known. I did not tell it outside of the business.

Cross-examination.

The name of the concern I am with is the K-W-N Pharmacy, K-W-N stands [948] for three members of the firm, my old firm, R. E. Kibler, G. de Foix Wilson, and O. L. Nettles. Mr. R. E. Kibler is not with the firm. He retired from the firm about a year or a year and a half ago. Mr. G. de Foix Wilson is with the firm, Doctor Wilson bought Kibler out. Mr. Kibler is in Spartanburg in the manufacturing of patent medicines. I have been with this concern about four years, not in this special location, but with the firm. I was prescription clerk up until the

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time Mr. Kibler left, then I took his place as manager of this branch. They had two stores at the time, but only have one now. Prior to the time I was with this concern, I was with the Union Drug Company, Columbia. I was with them several years. Before that I was with Mr. Frank Hurd in Columbia in the drug business, I was with him some little time. I was with another, Mill's Drug Store in Columbia, I should say about two years. I started with the Mills Drug Company, my capacity with them was assistant in the drug department and working around the soda-fountain too with the help of a small boy. I think they handled Coca-Cola exclusively. I do not remember that the word dope was ever used then, I do not remember the word Koke being used in the South at all until they began to call for it at my soda-fountain as "Koke." None of my customers used it, that was in the Spartanburg neighborhood. I never had calls for Koke until the last year or so when I put in Koke and Dope, Koke and Dope is the same thing, comes labeled to me "Koke and Dope." At this Mills Drug Store in Columbia I do not remeber ever having served anything like Dope, I do not think they ever called for it, that has been a good many years ago, possibly 8 or 9 years ago. I was not continually at the fountain. I do not know just when this name Dope was applied to drinks at the soda-fountain, it was not applied before August, 1914. I never knew there were drinks called for by that name at soda-fountains. I do not remember any calls for Dope

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at this particular drug-store at all. That is at Mills, at Columbia. They only handled Coca-Cola. My first acquaintance with the word "Dope" was at the Union Drug-store in Columbia [949] that is a drug-store right opposite the depot, handling a lot of transient trade, and that word Dope was used there more than any place I have seen, and further up town it became a right special name for drinks at soda-fountains. After leaving the Mills Drug-store I went to the Union Drug-store. They handled a drink sold by Mr. Sizemore. It looked like Coca-Cola; they handled Coca-Cola also. It tasted like Coca-Cola. It was cheaper than Coca-Cola. I was at the soda-fountain but I was not special soda-man. When dope was called for there this syrup was given, it was the cheaper syrup. I think some few of the men gave Coca-Cola when dope was called for when they had been buying Coca-Cola and fastened that with the soda-men, when they came in and would say, "Give me my dope" and they were served with Coca-Cola. Both Coca-Cola and Sizemore's product was sold for 5 cents a glass. I do not remember the name of the Sizemore product, I do not know that even if it had a name. If I was at the soda-fountain and a man called for dope I would not necessarily think that he wanted Coca-Cola and I gave the drink there was the bigger margin of profit in, a drink without a name. That was the only drink similar to Coca-Cola. I was with the Union Drug Co. possibly 4 years. It was the latter part of my time there this article was put in by the manager of

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this place, this Sizemore syrup, and the first part we only had Coca-Cola. I naturally thought they wanted a cola syrup and gave them Coca-Cola, unless as I said, previously they would come there and point out capudine and say, "Give me my dope." Capudine is a headache drink. Prior to the time we handled this Sizemore's drink, and a man asked for dope I gave him Coca-Cola as a rule unless I knew he did not want it, like I said a few minutes ago, some men became acquainted at the soda-fountain by the special drink they called for and they got the habit of remembering them by the drink they bought, whether Coca-Cola, Ginger Ale, or headache medicine, and grape juice and they would say "Give me my dope." After the Union Drug Co., I went with the K-W-N Pharmacy. In the early part of my stay with the Union Drug Co., if a stranger came in [950] and asked for a dope I would ask him what drink he wished. I did not know anything about Coca-Cola, that was my acquaintance with the word dope, right there, and if he specified Coca-Cola, of course he got Coca-Cola. I was a prescription man, not a practical soda dispenser. If a stranger came into my place of business, if he asked for a "Dope" I would ask him what he wanted until I got acquainted with what he wanted; if he came in often and pointed out to me that he wanted a cola, when he came in and called for dope I understood what he wanted. This K-W-N company always handled Coca-Cola, and a general line of drinks, and Mr. Kibler at that time was doing the buying, and I do

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not know what he was buying other than Coca-Cola and the other drinks. If he was buying any other cola drinks, I do not know it. They always got Coca-Cola when they called for it. I knew he had a cola because I had charge of that end of it, of getting the supplies from the cellar and I knew that he had a cola. The name dope did not become applied up there quite so quickly as it did in other sections, as I have said before. We handled some other drinks there right at this Union Drug Co., this particular place, there were more calls for dope than any place I had ever been. In the latter part of my experience at the Union Drug Co., they would come in and call for dope and I did not know what they wanted. After I became acquainted with a good many people at the K-W-N and they called for dope, I served Coca-Cola because I had nothing else in the house. The K-W-N commenced handling other drinks in August of 1914, I bought a barrel of this Dope, the Central Koke Company's product. We bought a half barrel of this Hagan & Dodd's drink over here, Ko-Nut, we bought that half barrel since August, 1914. I never had the three at the same time. I gave up Ko-Nut. I was out of Koke and Dope a short while. I had a talk with the representative of Hagan & Dodd Co., had a little talk with Mr. Hagan, but it was nothing more than a favor that I bought this little half barrel of Mr. Hagan, and I used it up and have not bought any since. He tried to sell me more, and I said, "No," I had discontinued it. I did not like the drink. I paid for Ko-Nut a

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dollar a gallon. [951] When I had Ko-Nut with Coca-Cola and I was asked for a dope, I gave them Ko-Nut. I paid \$1.50 for Coca-Cola, Ko-Nut is cheaper, both sell at the same price, five cents a glass. I instruct my boys at the fountain when a man asks for Coca-Cola, to give him Coca-Cola, and when he asks for Koke or Dope to give him what he asks for. While I was handling Ko-Nut I instructed him to give that as Dope. I had information from Mr. Hagan—advice rather, that his syrup was handled as “dope” and could be sold as “dope,” and I had this stuff on hand and could get rid of it. My customers knew I had a different cola drink, I told most of them. I changed because the representative of the Koke and Dope Company showed me where it was a legal syrup, a legal proposition that I could handle it through legal channels. Naturally, it was one dollar a gallon, a little more of a bargain to the drug-store, and I handled it for that reason, and the reason that they had the words “koke” and “dope” copyrighted. This representative of the Koke Company showed me a sample of the syrup. He did not tell me that when “Koke” and “Dope” were called for I had to sell their drink. He said here is a syrup you can make a larger margin of profit on than any other drink you handle, as for instance Coca-Cola, but I do not know as he said Coca-Cola. It sells for one dollar a gallon, and you will have calls for it, because we are going to advertise it before the people. I thought I had a right to sell it when “koke” and “dope” were called for. He did

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not say anything about selling anything else when "koke" and "dope" were called for. I am not positive that he gave me a card at all, he made me a sample of this drink and said to taste it. I tasted it and it tasted all right to me, and I bought it. I have had people say they could tell the difference in Koke and Dope and Coca-Cola and I would just set them out and say "Can you see the difference in these two drinks, taste them" and as a general thing some say they can and some say they cannot. I paid a dollar a gallon for Koke. Ko-Nut was not satisfactory, when I got down into the barrel it was a little different. I did not compare Ko-Nut with anything, Mr. Hagan had been calling on me for a long time and I bought it through friendship for him. There [952] was a little something wrong with the flavor in comparison to the Dope and Koke I had been getting. I went back to Dope, I naturally compared it with Coca-Cola handling the two drinks. I have always kept separate containers. Before that I had not handled any drink of a similar kind and character to Coca-Cola since August, 1914, it might have been July, I hardly think it was as far as June. Up to June I had never handled any drink that was similar in appearance to Coca-Cola. I had two separate containers because they were separate drinks. I used it at the soda-fountain just the same as I used any other drink. I bought it and was buying it under this name and I used it under this name, sold it under the name. We never handled Gay-Ola to my knowledge. I never returned the Gay-Ola bar-

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rels thinking they were Coca-Cola barrels. I never handled Gay-Ola barrels at all. I do not know anything about what was done previous to my taking charge of the business. I was there in October, 1911, with the Company, K-W-N Pharmacy. The Central Drug Store—if you will permit me to say, put on a contest for the Gay-Ola Company and gave away fifty dollars in gold for some advertising proposition at their soda-fountain, and this Gay-Ola was handled at the Central Drug Store soda-fountain, we have gotten supplies from the Central Drug Store, ice-cream and things like that that we would run out and our cellar was used as a storage for bottles, ginger ale bottles and things like that, from the Central Drug Store; I cannot say but there might have been a barrel, or a Gay-Ola empty barrel to be sent back, possibly sometime before I took charge of the business, but the Gay-Ola barrel was sent down from the Central Drug Store. As I said the Central Drug Co., used our cellar for a storage for barrels and empty ginger ale bottles. The Central Drug Store was a branch of the K-W-N for the first eight months. We did not do any exchanging, we had a cellar down there where we could store these things in, and we did for the Central Drug Store, and it might have been when they were returning Coca-Cola barrels, they returned the Gay-Ola barrels, but I do not think there was any mistake [953] about it. We bought our Coca-Cola syrup from the Gear Drug Company, something like three or four hundred gallons of

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Coca-Cola a year from the Gear Drug Company. We do not buy from any other place. In 1914 I think we used only three hundred gallons, in 1913 something like three hundred gallons. I have only used two barrels of this Central Koke and Dope, and one-half barrel of the Ko-Nut in my time as manager of the K-W-N Pharmacy. I will find out when I bought this half-barrel of Ko-Nut so it can be put in this record. When I had Ko-Nut and was out of Koke and Dope I put the Ko-Nut in the container that had "Dope" on it. We have pumps, I do not think there is anything at the time we pasted a label, which had been on there, the nickel had been scrubbed off, but if there was one it might have been pineapple or strawberry. We first put on the label "Dope" and kept that on when Ko-Nut was in there. (Diagram of the fountain.) This side "A," this side "B." We labeled these containers, starting over on the extreme left of the dispenser "1" and we will come from there on toward the center with the number in numerical order, so that on both sides "A" and "B," commencing on the dispenser's left you would have fourteen containers in your fountain. I might not have that many, but I am using that diagram to show the position of Coca-Cola. Seven was dope. Now, on washing out the cup here, this young man might transfer that, slip it right over here to six; in washing out the cups, Seven, he took Six and moved it up to where Seven is, when he washed them out he put them back again. He was using seven always for dope. This whole thing

(Deposition of T. H. Lever.)

moved out, all of this would slip out and he would put it back to six, then when it was boiled out it was moved back to seven. Six is labeled Coca-Cola, five is labeled Coca-Cola. We did not have Dope in anything labeled Coca-Cola, the cap of the plunger, but the label stayed right in the same jar. Coca-Cola was in six, dope was in seven. We have two caps at our soda-fountain with Coca-Cola, six and five. We keep two cups for we have more orders for Coca-Cola than any other thing at the soda-fountain. When we were washing out seven, we had the [954] dope in the tin package. Since I have been handling this one drink, Dope and Koke, that was my instructions to the soda-fountain men. I have no reason to believe that he would do anything different from what I told him. So far as I believe that was in vogue at our place of business since August, 1914, I always found it so. I could tell the different syrups by the labels. In following out my instructions, I do not think they would put Coca-Cola syrup in the wrong one. All I went by was the label and my instructions were when a man came in and asked for Coca-Cola I served him from Six and Five, and if he asked for Koke or Dope, out of seven. If I was out of Koke syrup I would serve him Coca-Cola but I never served Coca-Cola out of the Koke and Dope container. I am never out of Coca-Cola. Understand the Gear Drug Company by special permission I suppose from the Coca-Cola Company, if we run short on a barrel of Coca-Cola they are allowed to sell us ten gallons at this fifty-gallon price

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and we are never out of Coca-Cola. So far as my knowledge goes Coca-Cola has never been served out of the Dope container. Two different drinks made at different carbonations, would make a difference in the taste, that is, if the pressure on the carbonator was one hundred and forty pounds, that it would make a slight acid taste, slightly more than the one at one hundred pounds. I think the one hundred pound carbonation would be flat, I do not think that is enough in fact. Two hundred would be too much. The carbonation depends, not on the pressure altogether, but the mixture and the mixture depends on the proper proportions of the water and the gas. I never had any experience with water that was warm, my fountain is iced. The difference would be entirely due to the pressure largely. I do not know the first representative of the Coca-Cola Company that visited me, I think it was since August, 1914.

Redirect Examination.

You were asked on cross-examination if you ever handled any cola drinks or any drinks similar in color and taste to Coca-Cola before [955] you handled this Koke and Dope. A. Yes, sir. Q. I think you must have misunderstood the question because you stated you had not. A. This Ko-Nut—

Mr. HIRSCH.—Read the question. (The question was thereupon read.) “Q. What were you referring to then? A. Why, I was referring to the Ko-Nut, I suppose, that is the only article I ever handled. At the Union Drug Company I handled a product, I cannot recall the name, Mr. Sizemore is

(Deposition of T. H. Lever.)

the gentleman that sold it at that time, it was a heavy cola syrup, the taste and color of it was about the same as Coca-Cola. I handled it before I handled Koke and Dope. I was not the buyer for the Union Drug Company, but this was handled at the soda-fountain."

Cross-examination.

At the K-W-N I have never handled any cola drinks except Coca-Cola, Ko-Nut and Koke and Dope.

Mr. LITTLETON.—I want to tender this in evidence as Defendants' Exhibit No. 8.

Mr. HIRSCH.—I offer in evidence as exhibit to the testimony of Mr. Lever, Complainant's Exhibit No. 14.

Redirect Examination.

I know Mr. Ferguson, he brought a Coca-Cola bottle to me. I locked it up in the safe at the store. Q. I show you a bottle marked "Defendants' Exhibit No. 9" and ask you if that is the bottle. A. Yes, sir, that is the bottle. Q. How do you recognize that as the bottle that was turned over to you. A. Well, by the mark on the bottle there, and the substance in it. Q. What particular kind of peculiar substance is in that bottle. A. A rat. Q. Was that in there when it was turned over to you? A. Yes, sir. Q. And it was in there when it was turned over to Mr. Ferguson? A. I turned it back to Mr. Ferguson last night.

Recross-examination.

"I identify the bottle by the rat in it, I turned it

(Deposition of T. H. Lever.)

over to Mr. Ferguson [956] myself. Q. Suppose Mr. Ferguson had substituted another bottle after you turned it over to him. A. Mr. Ferguson has been in my presence and that has been in my grip, I turned it over to him last night. Q. He was not in your presence a few moments ago. A. No, but that was in my grip. Q. The only way you can identify it is by the rat. A. The rat in the bottle looked identically like that. Q. There are several bottles that look identically like that around Spartanburg, South Carolina. A. Yes, sir; but I never have seen one with a rat. Since the taking of the evidence of the above witness, T. H. Lever, Mr. Lever has advised the attorney for the defendants' herein and said attorney has shown the commissioner the letter from Mr. Lever, in which he states, "In my examination on the witness-stand yesterday in Atlanta, Georgia, I promised the attorneys for the Coca-Cola Co. I would secure and advise them of the dates of my first barrel of Koke and also of Ko-Nut. This half-barrel of Ko-Nut is the only other syrup besides Koke and Coca-Cola that I have handled at this place of business and the dates are, 1 barrel of Koke May 23, 1914, and a half-barrel of Ko-Nut August 29, 1914."

Deposition of Harrison Ferguson, for Defendants.

HARRISON FERGUSON.

Direct Examination.

Thirty-seven years of age; live in Spartanburg, South Carolina; lived there all my life practically.

(Deposition of Harrison Ferguson.)

I was Justice of Peace there until the 8th of this month. I bought bottled Coca-Cola in Spartanburg, So. Caro. (Defendants' Exhibit No. 9 introduced.) I purchased that bottle in Spartanburg at a Greek's fruit stand, by the name of Leo. I do not know whether that is his given name or his surname, he is known by that. That was the latter part of the summer, about the middle of August. I went down to buy Coca-Cola and asked him for a bottle of Coca-Cola and he give me this. I gave it to Dr. Corpe, who was Health Inspector there at that time, of the City of Spartanburg, until he left last Fall, and when he left he turned it over to me, and then for safe keeping I caried it down to the K-W-N Pharmacy and locked it up in [957] their safe. Dr. Corpe was there when I purchased it, I think, the health doctor, I turned it over to him because it had a rat in it, it looked like a rat, the same as in there now.

Mr. LITTLETON.—I wish to tender and offer in evidence this bottle of what looks like Coca-Cola as Defendants' Exhibit No. 9.

Mr. HIRSCH.—The testimony is objected to as immaterial, irrelevant and incompetent, and I move to strike it from the record.

Objection overruled.

Cross-examination.

I do not know how long this bottle had been in the Greek's stand, it was taken out of an ice-box he had, I did not see it bottled. I did not see him get it, although Mr. Lane, who had charge of the Coca-Cola works in Spartanburg, came up to see me in refer-

(Deposition of Harrison Ferguson.)

ence to it that afternoon, and it has the same labels which the other bottles had that he said were purchased at his plant, the same brand and all, but whether that came from there I do not know. I have never taken that crown off of there. I complained to Dr. Corpe, the Health Inspector. I suppose Dr. Corpe told Mr. Lane and he came up. I did not drink any of it. I bought it to drink. I usually hold a bottle up to the light, and I saw that substance there. I have not tampered with the bottle in any way, shape or form. The Greek looked utterly surprised when he looked and seen the rat in it, and offered me another bottle for it. I did not know what he had done with it before I got it. I just wanted to purchase a bottle of Coca-Cola. He had about the ordinary soda-waters and things of that sort. I just saw him open the box and he give me this Coca-Cola. I do not know who bottled it positively, but I think the local plant did, the Coca-Cola Bottling Works. I do not know the name of the company, I never paid that much attention to it, I just buy the goods and it is on the label. Mr. J. W. Allen has charge of the works there, and he has complete charge of it so far as I know, their place in Spartanburg is on Stuckey's Row, it is near the C. & W. C. railroad trestle. [958]

Deposition of E. A. Sharp, for Defendants.

E. A. SHARP.

Direct Examination.

Thirty-two years old; reside at 521 Hagan Street, Jacksonville, Florida. Have resided in Jacksonville about 8 years, engaged in drug business about 6 years. Name of our drug-store is the Terminal Pharmacy, located at 930 West Bay Street. We have a soda-fountain in our drug-store; we dispense ice-cream sodas, root beer, Coca-Cola, Dope, Brain-Ol, Gay-Ola, you know about the line of stuff we handled, all those. We do not dispense Gay-Ola right at the present time. Drinks similar to Coca-Cola in color and taste I have known of are Brain-Ol, Rock and Koke. Customers calling for cola drinks call for Coca-Cola and Dope we give them Dope, and when they call for Brain-Ol we give them Brain-Ol, if they call for a "Shot in the Arm" we give them anything we have got in the cola drink line. When a customer comes into our soda-fountain and asks for a dope or koke, I do not consider that he had made a definite and specific request on me to serve him with Coca-Cola only. We have handled this product Dope about three years, get it from Koke and Dope Company, New Orleans. We have a sign up, we dispense Koke and Dope, Coca-Cola, different things, that is immediately behind the fountain. We have changed that sign around several different times, we had at one time on the sign "No substituting here. We sell Coca-

(Deposition of E. A. Sharp.)

Cola and Dope, you get what you ask for." That was a big sign too, like that. We change it around on the glass, all of my customers know that we handle Dope and Koke and Coca-Cola, and all know that they are different. (Defendant's Exhibit No. 10 introduced.) That is one of our signs we used on the glass, a photograph of that sign. (Defendant's Exhibit No. 11 introduced.) Another photograph of the same thing, that is the last sign we have had on the glass. We had a call from a representative of the Coca-Cola Company, it has been about ten days ago, something like that. He came in to inform me that he had filed a suit against us for substituting. That we were selling something else for Coca-Cola when calls for Coca-Cola were asked for, that we were selling something else, [959] which we have never done. We never have substituted at all. We always had dope and Coca-Cola too, and he had a compromise that he agreed to compromise it if I would sign up the contract that I would not handle anything else but Coca-Cola, and on calls for Koke and Dope and "Shot in the Arm" and all these things, I would give Coca-Cola for it, it did not make any difference what it was, so long as it was the same color. He did not leave me a copy of the contract, but as well as I can remember there is something about the color of it. They asked us not to sell anything—but on calls for Koke and Dope and all those names, and similar drinks, that we should serve Coca-Cola on them, something like that in the contract, I do not remember exactly what it was. I

(Deposition of E. A. Sharp.)

signed it because I was not looking for trouble. I did not want to get into trouble and they threatened to file suit against me so I thought I had to sign it. He wanted me to agree not to sell anything but Coca-Cola, any drink like that but Coca-Cola. The contract was typewritten I think, not in handwriting, it was printed. I asked him to send me a copy and he said "No, he did not have any copies anyhow and he did not give me any copy of it. At that time I had a little Koke and Dope, only I had given an order for some of it. I wrote a letter to the Southern Koke Company, Limited, at New Orleans, with reference to it. (Letter handed him.) Yes, sir, that is what I wrote.

Mr. LITTLETON.—We tender and offer in evidence as Defendant's Exhibit No. 10, which is a photograph of the sign on the witness' mirror behind the soda-fountain, reading: "Coca-Cola and Dope, ask for what—" I do not know whether it is "want" or "wish"—yes it is "wish," and Exhibit No. 11, which is another photograph of the same sign, and Exhibit No. 12, which is a letter dated February 5, 1915, written to the Southern Koke Company, at New Orleans, and signed by the Terminal Pharmacy.

I am not now selling this dope, I quit selling it on account of signing the contract with the Coca-Cola Company.

Cross-examination. [960]

I put up this sign about a month ago, I guess. We were handling then three or four different cola

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drinks. We handled Koke, and Dope, Coca-Cola and Brain-Ol, that is about all the cola drinks we have. We started handling this drink Dope and Koke about three years ago, ordered it from the same people to whom I wrote the letter that has been put in evidence here. It might be two years ago. We used to sell a cola, the Rock Cola, and Gay-Ola and Brain-Ol. I have always sold these other products when Dope and Koke were called for. When Coca-Cola was called for I gave Coca-Cola. When Dope and Koke were called for I did not give Coca-Cola. In my estimation Dope and Koke were always similar to Coca-Cola, because I remember, it seems to me it has been about 10 or 12 years ago, they used to have a dope on the market just about the same as Coca-Cola. Dope and Koke are similar to Coca-Cola because they both contain about the same constituents, caffeine. That is the reason people call it "dope" because it is a cola drink with caffeine. Before we handled Koke and Dope we used to handle a cola and perhaps when a man wanted a dope or a koke we gave him Brain-Ol, or Coca-Cola, anything we wanted. I do not believe I had Coca-Cola by itself, I always had something similar. If a man asks for Coca-Cola he wants Coca-Cola and if he asks for a dope he means most anything in that line. I gave anything we wanted to when they called it "dope," except Coca-Cola. We had a drink that did not cost as much as Coca-Cola. These other drinks cost us less than Coca-Cola and that is the reason for it, everybody does it.

(Deposition of E. A. Sharp.)

Every man in my town has always handled three or four different kinds of cola drinks, and I have had it on the fountain. We did not give the other drinks when people call for dope and koke because they look like Coca-Cola. If a man comes in and asks for Koke or Dope, I do not know he wants Coca-Cola. If they call for dope they get dope. Gay-Ola costs us less than Coca-Cola, and it is sold for the same amount to the consumer, there is more profit in it to us. It looks and tastes like Coca-Cola. We had a sign on the glass, "We serve Dope." We had the sign right there off and on ever since we started [961] handling it; we have been handling it about two years I think. When a man came and asked for a Dope or a Koke we take it for granted he meant a cola drink that that was a dope. Men would go there and ask for a dope and when asked what they wanted, they wanted a drink. I can name a few of them. I know the people they come in from the Benning & Fuller Whiskey House, I cannot give you their names but I can get their names. I would not be exaggerating at all when I say I have asked a thousand times what they wanted. I quit serving when the gentleman had me sign the contract awhile ago, I took the sign off the fountain then. We used to ask that question when the sign was on the fountain to get them to read the sign, and the customers I would ask would say "What is the difference between Koke and Dope and Coca-Cola?" And I would try to explain it. One sign we had said "Coca-Cola is made in Atlanta, and Dope is made in

(Deposition of E. A. Sharp.)

New Orleans," and it said at the bottom, "Ask for what you want." That was the difference I made between the two drinks, one was made in Atlanta and the other was made in New Orleans. That is about the only difference I could tell in the drinks. A lot of people think there is not but one cola drink in the world and that is Coca-Cola. When they called for Dope they got Dope regardless of the cost, that did not make me give it to them any quicker. We give them what they call for regardless of cost. When they call for Dope and Koke we give them Dope and Koke. We gave them various things when they called for dope and koke at first because they do not specify the different drinks, we were privileged to use what we wanted and naturally we gave the cheaper drink. I could always pick out something that satisfied. I do not say what people think because I do not know. We have had those cola drinks ever since we have been in business, for six years, I did not remember which one I had first. I have always heard there was a dope so far as that is concerned, which was different from Coca-Cola. I first seen it advertised right in Atlanta, 12 years ago, something like that. I do not know whose concern it was, I remember seeing the hangers on the wall. I never thought Koke and Dope were nicknames for Coca-Cola, not necessarily. My estimation of the term is that it is [962] a cola drink. Some people may term Dope and Koke as Coca-Cola but we never did term dope as Coca-Cola, unless they specifically said after asking for Dope that they

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wanted Coca-Cola. We would rather serve something else we made the most money on. I suppose I could sell Coca-Cola as Dope too, if I wanted to, you can use it as you like. I said I can serve anything I like when they call for Dope, it is not Coca-Cola. I consider the cost when I am selling it. We consider Dope applies to any cola drink as long as it is a dope. I do not know whether they are all cheaper than Coca-Cola, all that I have handled are cheaper. You can serve anything you like for Dope and naturally a man would give the drink he made the most money on. There was no excuse to it, we gave them Dope or Koke either one if they did not ask for Coca-Cola, they did not ask for Brain-Ol or Gay-Ola we gave most any kind of dope. We are always looking for something to make more profit and that includes the whole business. When the public commenced using the terms Dope and Koke, we could sell dope and Koke and I was glad it was there, I am glad to make more profit, naturally. All these drinks are similar in color and taste to Coca-Cola and are cheaper than Coca-Cola. Our customers knew we were handling Gay-Ola, we had Gay-Ola signs, they used to put out signs, the Gay-Ola people. A salesman came along selling Koke and Dope, I do not remember what he did say to me. He told me the Koke people would have the same right to prosecute us for substituting as we would have for substituting for the Coca-Cola Company. He said I did not have any more right to serve Coca-Cola for Dope than we had to serve Dope for Coca-Cola. I think that way.

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about it now, I did not know of it being registered before these three years. I consider now that Dope and Koke represent Dope and Koke, before Dope and Koke meant a glass of drinks, we used it that way before it was registered. I said Koke and Dope were not definite terms for Coca-Cola. I think Dope and Koke are Dope and Koke and Coca-Cola is altogether a different name. I would not sell Brain-Ol for Dope and Koke when Dope and Koke were asked for now. I would not sell anything but Dope and Koke for this [963] New Orleans product now. I think they have the exclusive right to this Koke and Dope. We would be substituting if we sold any other product under that name. He said we would be substituting, the same as selling Dope for Coca-Cola, and as we would selling Coca-Cola for Dope. That they had Dope and Koke registered, the same Coca-Cola was registered, and I told him that we were serving Coca-Cola when called for and would serve Koke or Dope when Dope was called for. Dope and Koke was one product, he sold one product. He showed me the product the first time he came. I do not remember whether it was myself that bought the first time or not, I had a partner. I do not remember whether he sampled it the first time here, or what he did. I bought it because I thought I could sell it and make more money on it. I thought I could sell it under the name he sold it to me under, Koke and Dope. We had been serving something else all the time for Koke and Dope. We had calls for Koke and Dope before we put in the New Orleans product.

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This man said he had registered the trademark for Dope and Koke and this would protect us. This drink is cheaper than Coca-Cola. I do not know whether I read of all the agreement or not, I do not think I read all of it, I think Joe read most of it, I think I read about the color part of it, I read enough to find out I could not handle anything else but Coca-Cola because the representative told me he would file suit against me for selling something else. He said he would sue me for substituting Gay-Ola. We did not substitute Gay-Ola. I signed the agreement and I told him we did not substitute for Coca-Cola; that we had Koke and Dope and had Coca-Cola, that there was both in the soda-fountain and the one labeled Coca-Cola was Coca-Cola. The other was not labeled Coca-Cola. Mr. Littleton did not mention anything about what you were going to ask. He asked me some questions himself. I read enough of the agreement to understand that I could not sell Dope and Koke any more on the calls for Dope and Koke, because he said I was liable to prosecution. I did not see what the agreement said about nicknames for Coca-Cola. [964]

Q. Let me read to you from this—"Whereas, the party of the first part believes and know that the party of the second part has been, and may now be purchasing, handling and dispensing through his soft drink fountain, commonly known as a soda-fountain, a spurious and imitation product as and for Coca-Cola, in response to calls or requests of consumers patronizing his soft drink fountain for Coca-Cola,

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and particularly when consumers carelessly or otherwise call or request Coca-Cola by making use of several universally used nicknames, principal of which are the terms 'Dope and Koke.' "

A. Is that in there?

Mr. LITTLETON.—I want to make an objection to that, I want to object to the question and this contract because the contract has not been filed, and before he can properly cross-examine him on that I ask that he file that contract with the commissioner.

Objection overruled and appeal prayed and granted.

Q. Was that in the contract? A. I do not remember reading that in the contract. Q. You signed it did you? A. I signed it more on what he told me, what the man told me than anything else. I took his word for it. I did not want to have any trouble with them. I was not looking for trouble. I know the Coca-Cola Company have more money than I have. I did not know whether the Koke Company would have protected me or not. I was looking to them for something, I might as well look to them for protection as to the Coca-Cola Co. The Coca-Cola Co., guaranteed me that I would have protection if I would not sell anything else on calls for Dope and Koke but Coca-Cola. The Southern Koke Co., did not threaten to sue me because I sold Coca-Cola when Koke was called for. If I did that they had not threatened suit against me and the Coca-Cola Company had threatened to sue me because I would sell Koke when Koke, was called for. The Koke Co.

(Deposition of E. A. Sharp.)

said this is our trademark and you are substituting when you sell something else for Koke or Dope except our product, or something to [965] that effect. The Coca-Cola Co., showed me where somebody had bought some syrup and I spoke to the man who sold it and he told me he had sold Coca-Cola syrup. The representative of the Coca-Cola Co., said that he had bought some syrup from my place, he asked for Coca-Cola and my man said he had given him Coca-Cola. This representative of the Coca-Cola Company said that it was not Coa-Cola, that was the situation. I believed my man against the Coca-Cola man's because we had both syrups in the soda-fountain. I do not know that I can say I never had served any other drink besides Coca-Cola when Coca-Cola was called for because you are liable to get them mixed up in a soda-fountain. They are so much alike I think anybody is liable to get them mixed up. I did not say we get them mixed up, I said we are liable to. I think this man got two samples from my place, I don't know what he asked for. My boy told me he asked for Coca-Cola once, we don't know of the other time. We have different boys at different times. We kept those drinks first one place and then another, changing around on the fountain occasionally. We have two jars we keep Coca-Cola in labeled Coca-Cola, and two we keep dope and koke in. We have not got any jars labeled Dope. I can switch it around without mixing it up, that is take a jar up, and the pump out and put it on the other side of the

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fountain, that is the whole container with the other syrups, we change them around, we have to switch them around. If we put it by orange it changes the taste, pineapple the same way, each one will sour and we put it first on one side of the fountain and then on the other. Take Coca-Cola and let it set by orange for a month and it will taste like Coca-Cola. We exchanged the container and all, we may have Coca-Cola here and pick the pump and all up, and he could not have purchased Dope or Koke from this Coca-Cola jar. We try to serve them like they call for it. If we should make mistakes we do not do it intentionally. The pump from which the Coca-Cola is drawn is labeled Coca-Cola. We have never had labels for Dope and Koke, we use first one and then the other. I think the last we had [966] was in strawberry. We never put anything else in the containers labeled Coca-Cola besides Coca-Cola.

Mr. HIRSCH.—Now, Mr. Littleton, I want to offer in evidence that agreement that he signed, please sir. Now, I want to prove that, this is your signature, Exhibit 15, of complainant's testimony, to the testimony of E. A. Sharp, is that the agreement that you signed?

A. Yes, sir, that is it. I did not fill that in. I do not know, the thing was filled in at the top like this, I did not pay any attention to it. Matters of no more importance than that, I do not expect to read. I intended to cut that out and do what the man told me, for leaving off the sale of Koke and Dope it was of no importance. I told him it was not so very

(Deposition of E. A. Sharp.)

much to me on account of the price, as it was just 25 cents difference in the price of the products, I would willingly keep out of it before I would have any trouble with the Coca-Cola Co. I did not draw that contract up. I do not know who drew the contract up. The printed part was already drawn up when presented to me by the Coca-Cola representative.

**Deposition of Miss Marian Bloodworth, for
Defendants.**

MISS MARIAN BLOODWORTH.

Direct Examination.

Forty years old; live in Atlanta. Have lived here nearly all the time since I was about thirteen years, most of that time. My father was E. H. Bloodworth. My father came to Atlanta to go in business with Mr. Pemberton and Mr. Mayfield. He came here to go in business with Mr. Pemberton, Mr. Mayfield, and A. O. Murphy. I was living here with my sister when he came, he went in business with these parties, it was a medicine business, called the Pemberton Medicine Company. They came just before Christmas, it was 1887 that they came here and I think it was in the Spring that they went in business, just about it. They made Globe Flower Cough Syrup, Coca-Cola, lemon and orange elixir and Wine of Coca and some kind of hair dye, I do not remember that. Indian Queen Hair Dye, that was it. I used to go down to the place of business every few days, I drank that Coca-Cola they were making. They

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were making a dark brown red syrup, it tasted like Coca-Cola tastes now, and it looked like Coca-Cola. They had little kegs, I would call them for shipping [967] it out, they were painted red. They had "Coca-Cola" on them, they made this Coca-Cola three or four months, then they still made it and called it "Koke." Q. Did you hear a discussion among them? A. Yes, sir.

Mr. HIRSCH.—I object to what the witness heard as being hearsay and move to strike it from the record.

Objection overruled.

I have heard them discuss it. I heard my father discuss it at home a good deal, and of course they objected to Pemberton selling the Coca-Cola, but it seemed that his son sold it, that was my understanding, that his son sold it, and although they objected to it, it seemed that they sold it anyway, and after that they just began making what they called Koke, or something, calling it Koke. They spell that K-O-K-E. Mr. Murphy stayed in that partnership less than a year, I do not know how long. I know that we had come from the same town and I just naturally remember when they went back, they stayed here less than a year. My father and Mr. Mayfield continued to make it for several years, I do not know how long. Of course the business did not amount to very much, but it must have been for five or six years. My father has been dead four years in October. I was living with my sister, Mrs. Banks, the wife of T. C. Banks. T. C. Banks was liv-

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ing in Atlanta during that time. My sister, just older, Mrs. Shelverton, and a younger sister were living here with me.

Mr. HIRSCH.—I now move to strike out as hearsay testimony all the answers and questions which related to what the witness heard, as hearsay and incompetent.

Exception overruled.

Cross-examination.

I know these three men went into business with Mr. Pemberton, and that was what I call a partnership, that was about 1888. I know they discussed it about October, before I know my father came up here. I was living in Atlanta and I just recall that they came up about [968] Christmas and discussed with my brother-in-law about going into business and that was some time after Christmas; I do not remember when they went into business but it was in the early part of the year 1888, I think, somewhere in the first of the year. Of course I was a very young girl. I remember it was after the holidays when my father came up and discussed it before they went into business, and immediately after this partnership was formed they made and sold a product under the name of Coca-Cola. I distinctly remember labels of Coca-Cola. It was the word Coca-Cola written, I think, in kind of block letters, I do not think it was script as it is now. The labels were pasted on kegs in one form or another, I just remember seeing it on top of the keg. After they quit using Coca-Cola they used those same little

(Deposition of Miss Marian Bloodworth.)

kegs I have referred to, I was down in the plant a great many times. The plant was on Pryor Street, South Pryor. My idea is it was where the Kiser Building is, right down next to the corner of Hunter & Pryor where Dorsey, Brewster, Howell & Heyman are, and to my idea it was that same building. Then they placed Koke on the kegs the same way. My father was interested at the time they were making Koke. Besides this Koke they made the same Globe Flower Cough Syrup and the Wine of Coca, and the Lemon and Orange Elixir and I do not remember about this Indian Queen Hair Dye. I remember that was in there originally, but after that I do not recall anything about that. I know Mr. J. G. Bloodworth, he was my uncle. He occupied the office of Justice of the Peace here. He used to have his Justice of the Peace Courthouse down here on Hunter Street, up on the second floor. He was Justice of the Peace about fifteen or twenty years. I know that he was Notary Public and Justice of the Peace of the 1026th G. M. District, Fulton County. That was the correct description of it. My father was E. H. Bloodworth. I do not know whether my father ever made any affidavit in regard to this business as late as 1905, I have not any of his personal effects left. They were all burned after my father's death, my sister burned them. (Reading affidavit:)
"Atlanta, Georgia, August 9th, 1905. [969] "In 1888, A. O. Murphy, of Barnesville, Georgia, Mrs. Diva Brown and myself bought Dr. Pemberton's formulas including Coca-Cola. Mrs. Diva Brown

(Deposition of Miss Marian Bloodworth.)

spent considerable time in our laboratory and took quite an interest in the business. A few months after we bought Dr. Pemberton's formulas, he stated to Mr. Murphy, Mrs. Brown and myself that he neglected to state to us at the time that he made the trade with us that he had sold the Coca-Cola formula to his son, Charles Pemberton, and Mr. Lowndes, and it should not have been included in the sale to us. Dr. Pemberton's deed to his son and Lowndes was dated a few days before the deed to us. Dr. Pemberton died soon after and we lost the Coca-Cola name. We used the formula and called our goods Yum-Yum, but failed to successfully introduce it."

A. I do not know whether that is true or not, my father never discussed it with me. I do have a faint recollection of the drink Yum-Yum, but I do not remember that they called the drink Coca-Cola that. I do not remember anything about a Mrs. Brown. The first part of it I do know is true, but I do not recall them making this drink and calling it Yum-Yum. That is very indistinct. I could not say, and I have no recollection that they called the drink they were making by the Coca-Cola formula, Yum-Yum, I never heard that. I have no idea whatever of what it was, my indistinct recollection is, it was a medicine. I do not recall Mrs. Diva Brown. I know there was a lady in the office, but I do not remember her name. I met Mr. J. C. Mayfield's wife. I do not know that she afterwards became Mrs. Diva Brown. It must have been the last of the year that Koke was produced, it was after they had sold out to Pemberton

(Deposition of Miss Marian Bloodworth.)

but I do not remember exactly about it. It was just as soon as they could, I know, for awhile they were undecided on a name. Mr. Murphy I think left about the last of the year, I think he left after they adopted Koke. They must have been in business about three or four months perhaps when they sold the Coca-Cola, then they began making Koke and it must have been about four or five months after they started business, five or six months, I would say. [970] The best I can say Koke was put on there like the word Coca-Cola, that the word Koke had been substituted for Coca-Cola on the packages. I do not know whether it was painted or on a label. My father and Mr. Mayfield continued after Mr. Murphy sold out for several years, I think it was 4 or 5 or 6 years. All that time they continued to manufacture and sell this product Koke. If my father ever sold out I never knew it. My idea was that it just simply did not amount to anything and my father was not making anything at it and really could not afford to keep it up and he simply worked on with his regular business. He had always been in the cotton business and he went on with his cotton business and Mr. Mayfield carried this business on. I recall father used to hear from him in Birmingham. My father was never actively engaged in it any more, because he could not afford it. He was not making anything out of it and he went into business where he could make a living. When my father went out of the business the machinery and material that they had on hand I think Mr. Mayfield took. I think he

(Deposition of Miss Marian Bloodworth.)

kept it in Atlanta four, five or six months. Of course that is hearsay. I remember afterwards father talking about it. I think he had it in a little place on Trinity Avenue for a good many years, Mr. Mayfield continued in business for a good many years. I just suppose he had been making all those things that they had been making, but if he was not, just what he dropped I do not know, but I do know my idea was that he kept on making all those medicines. While my father was with them they kept making Wine of Coca, and Koke, and I have heard him talk about Globe Flower Cough Syrup, Lemon and Orange Elixir, and possibly Indian Queen Hair Dye. I remember the Wine of Coca label. It seems to me it was put up in bottles. I recall a big bottle, kind of like a whiskey bottle, just about the size of a quart bottle, whiskey bottle, and I think it looked as if it was in script, as if it was in handwriting, Wine of Coca. I mean it was printed to look as if it was in writing. I do not know what was on the label, that is all I remember, just Wine of Coca. Father simply quit the business, so far [971] as I know there never was any sale. Wine of Coca was sold as a medicine. I never heard it used as a soda-fountain drink. I am positive Coca-Cola was made and sold under that name by Dr. Pemberton, my father, Mr. Murphy and J. C. Mayfield. I remember that distinctly and positively. I know they sold it in Atlanta. I do not remember the names of anybody they sold it to. I do know they sold it in Barnesville. I know afterwards when I was visiting

(Deposition of Miss Marian Bloodworth.)

Barnesville I remember the druggist telling me there that he had all of these things, Coca-Cola, Wine of Coca, this dye, and Globe Flower Cough Syrup. The Globe Flower Cough Syrup was a medicine. Wine of Coca was a medicine. Coca-Cola was a drink. I remember the druggist having told me that, his name was Blockman, I do not remember his initials, he is in Barnesville yet in the drug business. He was not in business for himself at that time, I do not remember who he was in business with. He told me he had it, and I saw it in the drug-store. I never saw any Koke there. I do not know what year it was, because I have always visited Barnesville off and on.

Deposition of Mrs. N. L. Shelverton, for Defendants.

Mrs. N. L. SHELVERTON.

Direct Examination.

Forty-three years of age; live in Waynesboro, Georgia. My father is E. H. Bloodworth. I am a sister of Miss Marian Bloodworth who was just on the stand. I did have papers belonging to my father. I was the oldest living girl and when my father died he just told me that his papers were in his trunk and that I should go over them and keep what I chose and destroy what I chose. Soon after my father's death we moved away from Atlanta and I destroyed all that I thought I wanted to destroy. We have been away from Atlanta about 4 years and papa died four and a half years ago. It was just after his death—I do not remember the month exactly, but somewhere about 4 years ago. Of course a great many of the

(Deposition of Mrs. N. L. Shelverton.)

papers were like any one of sentiment, a great many private letters and then a few business letters I kept, but then I destroyed some of them, regarding some of his business letters, business arrangements, I did not think I would have any further use [972] for them after his death. They were personal things as I felt. I did not destroy any papers without reading them, the paper that made the most impression upon me, that I hesitated to destroy, but finally did destroy, I am sorry, was this contract, and with this contract I also destroyed some cotton papers that have proved a loss to me since. He was a cotton man. This business contract, you know a woman is not much of a business person, I suppose you would call it an agreement. It was some kind of a legal contract, you know, regarding, I believe, my father and these other gentlemen; Mr. Mayfield, Mr. Murphy, Mr. Pemberton and my father and those others who put up their money against the doctor's medicine, against Mr. Pemberton's medicine, I mean, and I thought that was a man's duty—and he was dead, and of course his contract was nothing of mine. I remember some of the names of some medicines in that contract. Of course the one that made more impression upon me than anything else, there was a hair dye called Indian Queen Hair Dye, a Globe Flower Cough Syrup, a Lemon and Orange Elixir, and, let me see, Wine of Coca, of course I remember them and not only that, I remember the taste and everything regarding all these things, and naturally at his death I just threw the papers away. It had Wine of

(Deposition of Mrs. N. L. Shelverton.)

Coca and Coca-Cola in it, and of course that is the name that impressed me most because it was then so much before the public. I do not remember the date of the contract. Of course, at my time of life it came in, when it all happened, I remember that, but I do not remember the date on the paper. I just wanted to say that we were reading, there were several of us, we were reading, and I did the reading, that is why. Some of those that were present when I read them were my nephew and my niece. My niece's name was Mrs. Frances B. Thompkins, and Charles E. Banks was the nephew and we were sitting there and I was destroying and reading them aloud.

Cross-examination.

That was the Mrs. Frances B. Thompkins who used to live in Atlanta, she lives in Waynesborro now with me, she is a widow. My nephew, Charles E. Banks, I do not know his address, but he is in Chicago. [973] He travels for some tobacco firm, I think, I do not know whether it is a medicine company that had a side-line of tobacco or not. The last time we heard—it seems to me he had extracts, some kind of patent stuff he sold in our country. I could not tell you to save my life, and the only reason I know that is I found a little sample case which he did not take with him, and I know there were samples in it. I have not his present address. I last saw him two years ago in Newman, Ga. The last time his father heard from him he was in very bad health and not in any business at all. When I saw him last he was traveling. His father lives at Waynesborro, he

(Deposition of Mrs. N. L. Shelverton.)

is very ill. The parties to that agreement were Dr. Pemberton, Mr. Mayfield, Mr. Murphy and my father. The medicines described were Indian Queen Hair Dye, Globe Cough Syrup, Lemon and Orange Elixir and Wine of Coca, and Coca-Cola. That was a syrup, I have been to the factory where they sold it. Wine of Coca was made for a medicine, but I understand it is used for a beverage. My husband is a druggist and he said when a man could not get whiskey he would use it.

Mr. HIRSCH.—I object to the foregoing answer and move to strike same as hearsay and not responsive to the question.

I just remember the name, but cannot say about the taste of it, I was about 18 years old along about that time. I remember distinctly when they made that agreement. It impressed me so because when I read it we all began to lament that my father did not have enough foresight to keep Coca-Cola. Coca-Cola had been such a success, you understand, and we knew that if our father had kept it and advertised it as it has been advertised we would have been where Candler is, and naturally we have a grudge against him for it, as he has what we ought to have now.

**Deposition of Mrs. Frances B. Thompkins, for
Defendants.**

Mrs. FRANCES B. THOMPKINS.

Direct Examination.

I am twenty-nine years old; I live in Waynesborro, Georgia; my father is T. C. Banks. Mrs. Shelverton

(Deposition of Mrs. Frances B. Thompkins.)

who was just on the stand is my aunt. I was present after the death of Mrs. Shelverton's father, when she [974] was looking over some of his papers, she and I were living in the same home, it was just about three and a half or four years ago. Mr. E. H. Bloodworth was my grandfather, and my mother was the oldest child, he had lived at her home more than anywhere else and I was living at home at this time. It was after my mother's death and grandfather's death—I am a widow and live with Mrs. Shelverton. We were there cleaning out my grandfather's trunk, and we were going through to see if there was any of grandfather's papers we wanted, and so she picked up this paper, contract, some sort of legal agreement, I could not tell you exactly what it was. She read it to me and my brother sitting there beside her. She said, "Here is this old contract between my father and Mr. Pemberton," and in this contract were enumerated numerous articles, that were to be manufactured, and among them was Coca-Cola, and she read out the word Coca-Cola, and she said to me, "Isn't that awful to think that my father did not keep that." She said, "Think what we would have had to-day if he had not sold his formula to them, but had kept on manufacturing Coca-Cola," and she said, "Isn't it a shame that my father sold that, and that we are not making Coca-Cola to-day." I remember the names that were signed to that contract because she read them over to me and said, "Look at this; it looks almost like lithographing." My grandfather's name was there and I think it was signed by

(Deposition of Mrs. Frances B. Thompkins.)

Mr. Murphy, my grandfather, Mr. Bloodworth and Mr. Mayfield. I have no idea of the date of the contract. After she read it it was tossed and thrown into the fire with some other papers and books that we had. We had no use for it and were getting rid of all his rubbish.

Cross-examination.

I remember distinctly Coca-Cola because that was the impression which was the most foremost in our minds. I cannot remember but one other thing that was in there except Coca-Cola, and I know it had some Globe Flower,—I was right there beside her and she turned the paper to me. I glanced at it hurriedly, I did not read far into it again, that paper was destroyed. [975]

Deposition of L. A. Holley, for Defendants.

L. A. HOLLEY.

Direct Examination.

Sixty-one years of age; I live on Cleveland Avenue, Atlanta. Have lived there 17 years. Before I came here I lived at Roanoke, Alabama. I know Mr. Mayfield, first knew him in Alabama. I guess he was possibly 6 or 7 years old when I first knew him. I have known him practically all his life. I was in the cattle business along through the nineties, at Roanoke, Alabama. I came to Atlanta during that time, I went around to see him once, it was along in the '90's, somewhere after '90, sometime, I suppose, it was some 5 or 6 years before I came up here to live. It has been 23 or 24 years ago, as well as I can re-

(Deposition of L. A. Holley.)

member. I went around to his place of business hunting him up. It was on the south side, I am not familiar with the streets, and I could not name the streets. He was manufacturing some drink at that time, it was labeled Koke. I drank some of it, it was not syrup when I drank it, but he poured the syrup in it. It tasted something like Coca-Cola, it seemed something about the same color as Coca-Cola, a kind of dark-brown color, something like that. I went through his place with him. The receptacles as I remember, were kegs, possibly some jugs, I do not remember all about it. These kegs were painted red. This Koke label must have been on the keg, on the head of the keg. It was spelled K-O-K-E. It was printed in block letters. I have met him occasionally, seen him at different times ever since. I do not remember what businesses he was in personally, only what he has told me.

Cross-examination.

I came here from Roanoke, Alabama. I was born in LaGrange, Georgia. I went to Talladega, Alabama; from Talladega I went to Rock Mills, Alabama, then I went from there to Roanoke. When I left LaGrange I was about four years old. I think I lived in Talladega about 10 years, I then went to Rock Mills and lived there about 20 years, and then I went to Roanoke and lived there up to 17 years ago. Mr. Mayfield was living at Rock Mills when I first knew him, I do not know how long he lived there, he left me there, I met him at Rock [976] Mills as a boy. I met him here in the '90's, about 5 or 6 years

(Deposition of L. A. Holley.)

before I came to Atlanta; I won't state that positively, that has been a good while—I do not remember the year. I came here 17 years ago, that will be 1898. When I came up here I went around to Mr. Mayfield's place of business. I do not remember the street it was on, the south side, somewhere. I could not point to it now, somewhere in the neighborhood of Forsyth Street. This Koke label looked like block letters on the barrel. I was not paying any special attention to it. I remember the barrels and kegs were labeled. The word Koke was on a piece of paper on the barrel but I don't remember about the size or shape. I remember there was the word Koke on it. The reason I noticed was the way it was spelled. I was there around his place of business, not all through, just through there where he was working, I was in the office. I could not tell you everywhere I went that day. I may have sat down in the office and may have got up and walked around somewhere else, but I was in his place of business. I saw several barrels labeled "Koke." This "Koke" was on red kegs, there were other persons around there, I do not remember who they were. Mr. Mayfield was married. His first wife's maiden name was Talliferrio. I don't know where she came from. I knew her when she was a girl. They were married at Rock Mills while I was there. I do not remember when they were divorced. I do not remember anything about that at all. Mr. Mayfield was married when I came to Atlanta to pay him a visit. I think that was the same wife he had at Rock Mills, I did

(Deposition of L. A. Holley.)

not meet her over there that day, nor any time after that. I do not know whether the then Mrs. Mayfield was divorced from her husband or not. I do not remember any other kind of drinks being down there, that was the only one I paid attention to. I did not pay any attention to the drink they called Celery-Cola at that time. I did not notice anything else. Since I came here to live I worked for the Metropolitan Insurance Co. I have been working here for 11 years for the Home Art Supplies Company. Prior to that I worked for the Metropolitan Insurance Company and in [977] some department stores and worked all around for 5 or 6 years and then went with the Home Art Supply Company and have been there ever since.

Deposition of A. O. Murphy, for Defendants.

A. O. MURPHY.

Direct Examination.

Fifty-nine years of age; live in Barnesville, Georgia; have lived there with a few intermissions, first Macon and then Atlanta, since 1871. I am a fruit grower and a farmer. I knew of J. E. Pemberton, of Atlanta, Georgia. I first met him in 1887. My first introduction to him was through an advertisement that he had in the Atlanta Constitution in something like, I think it was October, 1887.

Q. I hand you a certified copy, being a photograph of page 13 of the Atlanta Constitution, of October 2, 1887, and ask you to point out there where the ad—just read the ad that was there, if it is not

(Deposition of A. O. Murphy.)

too fine to read. (Defendants' Exhibit No. 13.)

A. This sounds like it: "Wanted: An acceptable party with \$2,000 to purchase one-half interest in a very profitable and well-established manufacturing business, absolutely no risk, and guaranteed a 50 per cent profit on investment, with possibilities of much larger profits and rare opportunity to right party. A full investigation solicited. For particulars address, with your name, "Business; 81½ Marietta Street, Atlanta." When I saw that advertisement I wrote to that address there, got in correspondence with him. I suppose we passed something like half a dozen letters.

Q. I hand you a letter dated October 4th, 1887, signed by J. S. Pemberton, which we will mark Defendants' Exhibit No. 14, and ask you to examine that and say whether or not that is one of the letters you refer to? A. (Examining letter.) Yes, sir; this is one of them, and it occurs to me this must have been the letter in answer to my first letter to him, in other words the first correspondence I had with him.

Q. I hand you another letter dated October 8, 1887, and signed by the same man. J. S. Pemberton, marked Defendants' Exhibit No. 15, and ask you if that is one of the letters you speak of? A. (Examining Defendants' Exhibit No. 15.) This is just a continuation of the same correspondence.

[978] Another letter dated October 20, 1887, signed by J. S. Pemberton, marked Defendants' Exhibit No. 16, is the same thing; another letter marked Defendants' Exhibit No. 17, dated November 25,

(Deposition of A. O. Murphy.)

1887, signed by J. S. Pemberton is another one; another letter dated Atlanta, Georgia, December 18, 1887, signed J. S. Pemberton, marked Defendants' Exhibit No. 18, is another; another letter dated at Atlanta, Georgia, December 18, 1887, I do not believe that is signed; that is only part of the letter marked Defendants' Exhibit No. 19, is a continuation of the same correspondence; another letter dated December 30, 1887, marked Defendants' Exhibit 20, and signed by J. S. Pemberton, is a letter, correspondence, after I was up there. He had moved out to Edgewood then. Those letters were in my possession up to a few months ago, when I gave them to Mayfield, something like 6 months ago; when was it, 6 months ago—it was some time last year I turned them over to Mayfield when he was down in our town. They have been in my possession ever since their receipt until I turned them over to J. C. Mayfield. They were the original letters of the correspondence opened up by that advertisement. In December 1887, I finally moved to Atlanta and with Mr. Mayfield and Mr. Bloodworth, who was another townsman of mine, formed a partnership with Dr. Pemberton, under the name of Pemberton Medicine Company. When I first came to Atlanta I found Mr. Pemberton doing business down on Marietta Street, I have forgotten the number. He had an office in front, a laboratory in the back and in the basement he was making Wine of Coca, Coca-Cola, a cough syrup of some description and I think perhaps a hair dye and a preparation of

(Deposition of A. O. Murphy.)

some kind made from ginger, called gingerine, something like that, I think that is the list. The appliances he had back in his laboratory was a large settling tank, a bottle-washing arrangement and bottling contrivances of some kind such as you would have for preparing a medicine or drink. There was nobody with Dr. Pemberton at that time, associated with him in business that I knew of. He was making these preparations in a small way only when we come there. The first time I ever visited him he carried [979] me back in his manufactory, where he manufactured a bit in a small way. My first correspondence was between Pemberton and myself. Afterwards I drew into it my friend Mr. Bloodworth, E. H. Bloodworth, who was of our town, a personal friend of mine, and also a partner at that time, and after we arrived in Atlanta, before we consummated the trade, we met Mr. Mayfield, J. C. Mayfield from Alabama, who had also been in correspondence with him in reply to that advertisement in the Constitution, so after a conference between Mayfield, Bloodworth and myself, he came into the deal, and we formed the partnership, all four, Pemberton, Bloodworth, Mayfield and myself had equal partnership. We each one of us three were to pay \$2,000 cash into the concern and Pemberton was to have an equal interest and put up his laboratory, office fixtures and formulas, business, goodwill, and one thing and another as an offset for the \$2,000 each one of us put up. The formula for Coca-Cola was included in that transaction. I drew up the partner-

(Deposition of A. O. Murphy.)

ship contract, what you might call a business agreement, stating the terms of the partnership, such as is ordinarily drawn up on occasions of that kind. It occurs to me I drew it up under the direction of Judge Simmons, my father-in-law, Judge T. J. Simmons. He was living with me at the time; I think I acted in accordance with his directions and it seems to me I wrote it, I am not sure about that. It was a long while ago. I moved here in December, '87, it seems to me it was wound up some time in January, about the middle of the following January. I left the contract with Mr. Mayfield and Mr. Bloodworth when I sold out. I had charge of the office up to that time. I kept it in my possession but of course all of the office papers were then turned over to them. After we formed this partnership we continued to manufacture down on Marietta Street a very short time and then we moved up on Pryor Street, Pryor and Hunter, and continued the manufacture there, right in the second story. My office was at first on the lower floor and afterwards we moved the whole thing upstairs. When I came up here and met Mr. Pemberton, no persons by the names of Lownes or Venable [980] were associated with him to my knowledge. They were not making this product Coca-Cola at that time to my knowledge. Mr. Pemberton did not tell me that he had sold out this Coca-Cola to either of those parties nor to some parties named Walker or Dozier. I never heard of Walker except in a very indefinite way, so far as my recollection goes. He must have

(Deposition of A. O. Murphy.)

been a salesman on the road at one time for them, something of that kind I heard Dr. Pemberton refer to him. I never saw him in my life, or Lownes, either. He did not tell me he had sold it to Mrs. Dozier. I never heard of that name before. We continued to manufacture this product right along, as soon as we could get in possession and get things shaped up. We sold the entire line, except the Globe Flower Cough Syrup and then we commenced I believe after that, including that in the line; gingerine, we also sold that and the hair dye. We did not press that much, but the Wine of Coca, it was a Wine tonic, put up in quart bottles, and Coca-Cola, the fountain syrup, and the gingerine were the three we pressed more than any others. I am acquainted with the color of Coca-Cola syrup to-day. The color of that syrup was identical with the color of Coca-Cola syrup to-day and about the same in taste. I drink very little Coca-Cola, but I do not detect any difference. The color and taste of that product we were manufacturing then under the name of Coca-Cola was the same as far as I can see as that now manufactured by the Koke Company and called Koke. We manufactured and sold this product Coca-Cola under that name. Something like a couple of months or perhaps it might have been more than that, or three months after that, this controversy with the old doctor in regard to Coca-Cola in connection with his son Charlie came up. This old doctor Pemberton had a son named Charlie Pemberton. He was helping him and just kind of helped in the

(Deposition of A. O. Murphy.)

manufacture when we took charge of the business. Then he sprung the question on us that he had sold the right to make Coca-Cola to his son Charlie. Really the way he expressed it, Charlie had, on certain occasions, obtained a written sale, a bill of sale, of this Coca-Cola drink and he would have to conform to it, but he would get us [981] up a substitute whict would be identically the same thing under a different name. Then arose the controversy in regard to that part of the business. This substitute he mentioned was not a different product from the one that we had heretofore been manufacturing, except in name. We first started out with the name called Yum-Yum, and then we got on to one or two others, Koke, and I think perhaps we got something into Dope too, something like that. This name Koke was kept up after I left the concern, spelled K-o-k-e. I do not remember who suggested that name. I took it for granted, however, Mayfield or Pemberton would, for they were in charge of the laboratory, I was not, I was the office man. We had a discussion about trying to keep the name Coca-Cola. One would naturally suppose we had quite a row over it among the partners, but the whole gist of the thing is this, after we had gotten our hands into the first and consummated the trade and got to work, and as I stated some little while ago, we found out to our sorrow that Dr. Pemberton was a drug fiend, and that of course, was distasteful to any business man, and then it grew from better to worse and the crowning act was when he violated his contract in regard

(Deposition of A. O. Murphy.)

to this Coca-Cola syrup, and we of course had quite a warm time of it for a little while and he had to try to pacify us with the idea that we put out identically the same thing under a different name, and at that time most anyone acquainted with the history of these drinks knew about that time *with* Coca-Cola. Wine of Coca or none other of these drinks were very prominent. They were all in their infancy, in fact that drink idea, soda-fountain drink idea was in its infancy, and rather than break up the whole thing and create a row among partners you might say we tacitly and silently went to work to see if we could offset it in some other way; as I remember it; that is about as near as I can state it, or in as plain words as I can make it. We held to Koke after we used Yum-Yum a while and abandoned that, and then agreed on Koke, and Mr. Mayfield continued after I left the business. Koke was adopted for the product in the spring of '88. I could not specify the day nor the [982] month, it is too far back. The product was all labeled whether it went out in the shape of kegs or barrels, we did not use much barrel stuff, of course, then, we were too little. Sometimes it went even in smaller quantities than that, and when put out it was of course labeled just like Wine of Coca was labeled, labeled with this word Koke. Those barrels and kegs, to my recollection, were painted just common red. When we formed this partnership and Mr. Pember-ton turned over his goodwill, his business, and all of his formulas that were specified in that general

(Deposition of A. O. Murphy.)

partnership agreement that we had, everything from labels, stationery, in fact we used the old stationery for some time, until we could get our new stationery printed up and under the name of Pemberton Medicine Company. The labels were turned over to us, hauled over by the wagonload—cartload. Dr. Pemberton and Mr. Mayfield had charge of the laboratories. Of course I was in them off and on and aided myself in making it with them, but they were recognized as the head of the laboratory department. Mr. Bloodworth was on the road. Mr. Mayfield knew the formula for making the product, that was done when Dr. Pemberton was at home. Mr. Mayfield was the practical man in the laboratory. Dr. Pemberton was simply directing him. The way we used to make that product we took the actual extract from coca leaves, it was black as tar and strong enough to knock a bull down, and then the extract from the cola nut, and mixed those two with certain preparations, with this syrup, and made it from that. We bought the actual leaves themselves.

Q. Now, after you had formed this partnership, do you remember whether or not you wrote a letter to the Patent Office on the stationery of the partnership, asking to have a label or something of that sort copyrighted or registered in the Patent Office for a product named Lemon and Orange Elixir. To refresh your recollection, I hand you a photograph of a couple of letters? (Passing same to witness.) Defendants' Exhibit 21, that whole batch of several pages is the letter written by me. That is the sta-

(Deposition of A. O. Murphy.)

tionery we had at that time, the [983] date of that letter is March 8, 1888, that picture on the left of the letter-head there is a picture of the cola plant, the old doctor had a cut of it, you know, and we incorporated it in all of our stationery, on our letter-heads, and I think it is on the labels that we pasted on the Wine of Coca. I am not sure of that. We tried to carry that through it, you know. That picture there is the picture of the coca plant. At that time there seemed to be quite an interest in the extract of coca leaves and cola nut as a nerve tonic, is my recollection, and soon after we got over on Pryor and Hunter Street, we found out that Thurbee Wyler & Company of New York were putting up a Wine of Coca that they were calling "French Wine of Coca." We got into correspondence with them. It seemed that it was up there in New York City too, the effect of the extrat of coca leaves upon the nervous system, and we at once thought of stopping them in that, and we did carry on considerable correspondence to the extent of getting the legal opinion of the Hon. H. J. Hammong, who was a personal friend of mine, and also of my father-in-law. I went to him as advisor and told him I would rather pay him to tell me whether I was doing right or no, than go into a lawsuit, and I paid him \$40 for him to tell me not to go into the suit.

Mr. HIRSCH.—I object to what anybody else told Mr. Murphy, and move to strike the same from the record.

Objection overruled.

(Deposition of A. O. Murphy.)

We attempted to have them stop, but we abandoned it. I only mentioned that to show that coca extract was at that time considered a nerve tonic all around. We advertised that feature of it as strengthening the strength of the nervous system. The public at that time knew about the coca. (Paper marked Defendants' Exhibit No. 22.) This is a paper covering the dissolution of the partnership so far as that is concerned, an agreement between the four partners consenting to my retiring and the assuming all the obligations and everything in the business. In the caption of that contract the date is mentioned [984] there when the partnership was formed. I suppose this is the exact date the partnership was entered into, or it would not have been specified in the agreement. It shows there as January 14, 1888. The agreement or partnership agreement is the one mentioned in the dissolution paper, that is the original paper, written by my brother, who was a lawyer. My brother was A. A. Murphy. I recognize those signatures on there as genuine signatures of the parties. That paper has been in my possession since it was executed, until I turned it over to Mr. Mayfield with this other correspondence, that was some time last year. (Defendants' Exhibit No. 23 purporting to be a label of French Wine of Coca.) This is the label we used on the wine tonic, Wine of Coca. We put the extract into the wine in place of putting it into a syrup and this went into quart bottles. This is the label on the bottle. I know what Coca was after

(Deposition of A. O. Murphy.)

I got into the business. The general public heard of it through these preparations, of course. I had seen the Coca and Coca-Cola, and had tasted it, or used it, but that was the only way I was familiar with the plant until I became actually interested in the business itself. I never saw the coca leaves until I came to visit Dr. Pemberton in consummating the trade, and then he showed them to me. I was not familiar with it until then. The business was limited for several reasons, because there was not enough money to push them, but the trade was considerably scattered over the country, understand, but the volume of the business did not amount to a great deal. I believe his books showed two years there when they had done a good deal, where they had been very heavy, and I had access to all of those, the whole thing was turned over to me. I had the old books, inspected them before I went into the partnership, as to the value of the business, etc. I could not give you an accurate opinion in regard to the extent of the Coca-Cola business as to the sale of this Coca-Cola, and later on the product Koke, the extent of the sales of that product while I was connected with this partnership. You see it has been something like 25 years. Our business was modest. Very modest business on account [985] of the resources that we had then to push it, but we were pushing it so far as our resources would go. I could not give you the volume of the business from memory. I have no means of refreshing my memory about it. It was not sold exclusively in Atlanta. We had two

(Deposition of A. O. Murphy.)

traveling men on the road; Mr. Bloodworth traveled Florida, Georgia, the Carolinas and Alabama—not in Alabama. We had been out in Alabama, it seems to me, we went into Texas and then up into the Carolinas, Kentucky, Tennessee and that would be about the extent of the states we covered, in a way. It seems to me that our Mississippi man went into Texas a little; not a great deal, perhaps he went across into Texas some, but I would not be positive as to that. I think, perhaps, he did. I do not know of any other product, prior to the time we adopted this name “Koke,” of that name. I cannot say whether the general public at that time had adopted any nicknames for Coca-Cola. I say it is very natural. Perhaps one might be used interchangeably with the other—might be nicknamed for the other. If I had been on the road, a salesman, perhaps I might have run against a thing of that kind. The Coca-Cola product at that time was not extensively known. The business had not reached any considerable volume. It was, you might say, in its infancy along there. I cannot say as I ever heard the word Koke applied to that product at or prior to the time it was adopted by us. We adopted the name Koke because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution. Our idea in meeting the emergency was to still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by

(Deposition of A. O. Murphy.)

Dr. Pemberton. He was violating his contract in regard to this particular preparation. In adopting the name Koke our idea was just such things as would influence a business man in an emergency of that kind. I would not undertake to state that this think or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making [986] a business move in an emergency. I had never heard at the time we bought this Coca-Cola from Dr. Pemberton, and at the time we were doing business, up to the time he had sold it, of anyone else besides Dr. Pemberton making this same product and selling it as Coca-Cola. I knew of no string on his right.

Mr. LITTLETON.—We offer and tender in evidence Defendants' Exhibits No. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 as evidence on behalf of the defendants' in the above-styled causes. We did not know anything of this sale until after it was claimed it was consummated. I suppose I had met Mr. Mayfield's wife. They lived in a different part of the city from us and perhaps I had been introduced to her by Mr. Mayfield I just knew her as his wife. She had no interest in the business at that time or during the time I was associated with it, whatever, nothing to do with it.

Deposition of Lee Hagan, for Defendants.

LEE HAGAN.

Direct Examination.

Forty-six years of age; live Atlanta, Georgia; lived here 46 years. Engaged in manufacturing syrup and soda water for about 27 years. I am now manufacturing just a general line, ginger ale, root beer, lemo-lime, Ko-Nut, Afri-Kola. I have been making this Afri-Kola about five years. I have been making Ko-Nut about 4 years. The color of Ko-Nut syrup is similar to the color of Coca-Cola and the other cola beverages on the market. I made a similar product of that character before I began making this Ko-Nut and Afri-Kola, called Dixie. I manufactured that, I would say, two or three years. The Dixie was the first I made of the cola drinks, that was about 10 or 12 years ago. I sold them continuously from the time I began to manufacture it up until the time I quit making it. I handled other products. I have been bottling soda waters 27 years. I have bottled some Coca-Cola, once, I believe it was in '87. I bottled it just a short while. I had no connection with the manufacturing, bottling and selling of soft drinks prior to the time I have just indicated. I have done everything in the bottling business from driving the wagon up to bossing the shop, 27 years continuously. I have studied the business in its details, and competitive business and [987] drinks that have been on the market. It has worried me considerably sometimes. I cannot say how many caffeine preparations there

(Deposition of Lee Hagan.)

are on the market at the present time, except I know there are a good many of them. There is several right around this locality such as Cherro-Cola, Gay-Ola, Rye-Ola, True-Cola, Mi-Coca, Joy-Ola, Glee-Ola and I got a new one out last week in Mobile called Mo-olo, and one will be out next week here in Atlanta, one called Alcola, Uncle Sam. I have known of cola drinks, these caffeine drinks, not counting Coca-Cola, for about 16 years. I got into the Afri-Cola 16 years ago. I knew of that, of course, at that time and there were one or two other syrups on the market of the nature of Coca-Cola, Wine of Coca was one of them, and I have forgotten what the others were, there were several at that time. Wine of Coca was originally a medicine but they afterwards made it into syrup form and put it on the market as a soda-fountain drink, that is my recollection. That has been a long time ago. These cola drinks at one time were confined to Atlanta so far as I know. They seem to be scattered all over the United States right now. I have never seen a cola drink that was not of the same general color as our product and Coca-Cola are to-day. They are all colored with caramel coloring and some are a little darker than the others. I color our product with caramel coloring. Caramel coloring is cheapest and it carries with it some flavor, and it is of vegetable origin and stands the acid better than anything we can get. We could not color it pink or green neither because it would not stand the phosphoric acid, and to use either one of those it would have to be an

(Deposition of Lee Hagan.)

aniline color and that is prohibited by the United States. We color it a dark color instead of coloring it a light straw color, because using caramel coloring in the quantity we do we get a flavoring that we would not get otherwise. The barrels and kegs we ship our product in are painted red, I believe we have always used red paint. We had to paint them some color and that is about as cheap a paint as you can buy, it is the most durable and attractive. We just started painting our barrels for Red Rock Syrup; [988] it seemed to go along with the name. I am familiar with the manufacture of syrups with reference to the specific gravity of syrup. If you used the same quantity of sugar and the same quantity of water and the same temperature it would be exactly the same. The temperature affects the gravity. You take any soda-water syrup and mix it in different proportions of carbonated water, the flavor will be different, vary of course. You use the same syrup, and same carbonated water and the same quantities of each it will be the same all the time. The taste of a soda-water drink is effected by its temperature and how high or how low the water is carbonated. I have heard the words Koke and Dope. The first time I heard such expressions was when I first became connected with the Afri-Kola business. I heard that expression through our traveling man, Mr. Harris. We received an order from a customer of ours in Memphis, I believe it was, to ship a keg of dope. I did not know what it was. I asked Mr. Ferris about it

(Deposition of Lee Hagan.)

and he said that was a name that they called the cola drinks in Memphis. The first time I ever heard the expression.

Mr. HIRSCH.—We object to what anybody told Mr. Hagan.

I had never heard the word dope applied to soda-fountain beverages before that time. There was a concern here in Atlanta once that used to put out a product under the name of Dope, the name of that concern was Dope Company. I think they labeled their bottles Dope; they advertised their product in Atlanta, I do not remember how extensively. It was a caffeine drink, one of these cola drinks. It was similar in color and taste to Coca-Cola. This concern in Atlanta put out these goods under the name of Dope 12 years ago, to the best of my recollection; it might have been 8 or 10, but I think it was about 10 or 12. Prior to that time I think I had heard that name applied to Cola beverages, principally to Coca-Cola; it seemed to be applied to most any Cola beverage. I do not know whether any other concern had prior to that time ever labeled any product with that name or advertised any product under the name of Dope. The word Dope generally means [989] a Coca-Cola drink. By a Coca-Cola drink I mean a cola or caffeine drink. I would not say it applied to any specific drink, it is more to a class. I do not think it specifically applies to the Coca-Cola drink manufactured by the Coca-Cola Company, manufactured here in Atlanta. Last spring we had our attention called to surveillance of

(Deposition of Lee Hagan.)

our plant here in Atlanta by people purporting to be representatives of the Pinkerton Detective Agency. We had a little trouble of that kind; our foreman reported there was someone following our teams to the depot and inspecting them and offered to pay him to let him take the names off the packages, to whom the shipments were going to, and wanted to know what about it. I told him to go ahead and take the money and they paid him and took the names off the packages. They did that for several days and also took photographs of the dray and packages. He asked them what they wanted with it but they would not give me any satisfaction. I tried to have one arrested but could not get him arrested. I followed one of them and he went to the Pinkerton Agency in the Candler building. I think Candler, Thompson & Hirsch's office is in the Candler building. I do not know whether the Coca-Cola people have an office there or not; I think their office is in another building on Marietta Street; it is off Marietta Street, Magnolia Street. Some of our customers have reported representatives from the Coca-Cola Co. had been around to see them. In some instances they had them to sign an agreement to discontinue using our product, and use Coca-Cola exclusively in the future. I do not know by what means they procured the signing of this contract; I have read those contracts. We sell our product at a dollar a gallon delivered. I do not know what the Coca-Cola people do. Our customers have written us that the Coca-Cola Co. has threatened them with

(Deposition of Lee Hagan.)

lawsuits if they continue to handle our product.

Mr. HIRSCH.—I object to the writing as being hearsay and incompetent testimony and move to strike the answer.

Objection overruled. [990]

I knew Wine of Coca before I got into the bottling business; it was a medicine then and as a syrup about 20 years ago; that syrup at that time the drink made therefrom was about the same in color and taste as the color and taste of Coca-Cola. I think Mr. Candler knows that I am in business here; Mr. Asa G. Candler, the president of the Coca-Cola Company. I expect he has known it about as long as I have, so far as I know; he has known over all that time all the time I have been making and handling these cola beverages that I have been engaged in that business of making them. He has never sued our company or taken any steps to oppose our right to manufacture our product and sell them. The Coca-Cola Co. has never taken any steps against our company to contest our right to manufacture our syrup in the way we do and sell it in the way we do.

Mr. HIRSCH.—We admit on the part of the Coca-Cola Company that Mr. Lee Hagan has been in business as long as he says he has been in business and that it was known by the Coca-Cola Company that he had been in that business.

Cross-examination.

The time I bottled Coca-Cola, the company was known at that time as the Capital City Bottling Works; I was with L. P. Thomas; I never was con-

(Deposition of Lee Hagan.)

nected with Whitehead; that was the product made by the predecessors of the Coca-Cola Company; that was before Mr. Candler became connected with the Coca-Cola Company.

Redirect Examination.

I bottle Ko-Nut now. The Ko-Nut bottle is entirely different from the Coca-Cola bottle; it is about a third longer; it is a tall, slim bottle; it is nothing like the shape of the Coca-Cola bottle. I have been using that type of bottle about 8 or 10 years; that is the only cola drink I bottle. Prior to the time I bottled Ko-Nut I bottled Dixie; that was put up in the old Hutcheson stopper bottle, before the crown bottle came in use. The crown bottle came in use about 14 years ago, I think, here in Atlanta. A good many bottles have a special shape for their own, but the bottle used by the Coca-Cola people at this time [991] is very similar to the soda-bottle used 25 years ago by all bottlers for bottling a general line of soda water.

Recross-examination.

I never met Mr. Mayfield in my life until several weeks ago he came to my office, there was some gentleman with him. He told me he was in litigation with the Coca-Cola Company and wanted to get some information from me. I believe there was something said about Dope and Koke. My recollection about it was he was very anxious to get me to come in with him on his case, that I could be of material help to him in upholding his right to the words Koke

(Deposition of Lee Hagan.)

and Dope; it would not affect my business. I did not encourage Mr. Mayfield very much, in fact I would not talk to him. He knew I was selling my syrups as a Koke and Dope drink; that the customers were selling it for that under those names. He left me under the impression that if he were successful he would not interfere with me in selling my beverages under that name. I was in business in 1887; that is my recollection. I do not remember anything about any drink being made around here at that time under the name of Koke, sold in Atlanta under the name of Koke. There was nothing sold as Koke at that time as I ever heard of, or dope. The first time I heard that word Dope was in '99. I first heard the word Koke the last few years. I knew of the words Dope and Koke as applying to this class of beverages long before I ever heard of them.

Q. What do you think of the claim of the defendants herein to the exclusive rights of the terms Dope and Koke?

A. I think it is a lot of foolishness.

Mr. LITTLETON.—We object to the question and answer on the ground it is irrelevant and incompetent and move to strike it out.

Objection overruled and appeal prayed and granted.

I conceive that the Coca-Cola was the original cola drink, koke drink or dope drink, and their advertisements called attention to it.

Deposition of George R. Edmondson, for Defendants.**GEORGE R. EDMONDSON.****Direct Examination. [992]**

I am thirty-eight years old; business, druggist; we have two places, one on Broad Street and one on Pryor Street, in Atlanta, Georgia. I have been in the drug business about 17 or 18 years, I think. We have a soda-fountain at our place of business and have had during the time I have been in business. I know Mr. J. C. Mayfield. I first met him, I guess, in '98 or 1900; it has been quite a long time ago. When I first met Mr. Mayfield he was here engaged in the manufacture of a soda-fountain extract. We bought some extract from him; we bought some of it, I guess from time to time for 5 or 8 months before he left Atlanta and he went from Atlanta to Birmingham and we got some after he left Atlanta. We mixed it with syrup; it was an extract that we bought, you understand. We mixed it with simple syrup, a heavy syrup, and then added aerated water to it when we served it at the fountain. It was very similar to Coca-Cola in color; we served it like Coca-Cola in seven-ounce glasses. I do not know whether I had compared it in taste with Coca-Cola, it was a long, long time ago, sir, and I cannot say. The syrup came to us in little kegs, possibly five-gallon kegs. I think they were painted red, that is my recollection. I do not know positively, I think they were. It was called dope or koke, I have forgotten, I do not know which one. There was a label on the

(Deposition of George R. Edmondson.)

kegs, I think, just giving the kind and a formula, tell you how to mix it; telling one gallon of this to ten gallons of syrup, something of that kind. I think the name of the product was also on the label, called either Dope or Koke. It has been so long and I never paid very much attention to it at the time, and, in fact, never thought anything of it.

Cross-examination.

If a man comes into the store and asks for a dope I think he wants a cola. I do not know that I have anybody ask for a Koke, it might be that we do occasionally. I never work at the fountain but I am in the front of the store and hear a lot of people call for Dope. When asking for a Dope I think they want Coca-Cola. When they ask for Koke I guess they want something, there are so few, I never heard but a few [993] ask for a Koke, and Dope; there are quite a few that call for it. I have heard those expressions applied to Coca-Cola, that is, Dope, just as far back as I can remember, I guess. Most of them ask for Coca-Cola, or a Cola but a man may come in and say give me a Dope, or a Dope and line. I have understood always what they meant. I know we got some of that extract from J. C. Mayfield and I know he called it Dope or Koke, I do not remember that it was Celery-Cola on the label. I think my recollection is, I know, he called it something as Dope.

Redirect Examination.

I think at one time we handled possibly a gallon

(Deposition of George R. Edmondson.)

of syrup that Wiley made, with a little receptacle on the fountain that he was trying to advertise, but only for possibly a month or something like that. It did not amount to anything. That was a Cola drink, I had a little gallon or two glass container that you could set on the fountain, you understand. I really have forgotten what he called it, but the people did not ask for it and we discontinued it. We handle Coca-Cola now. Aside from these Cola drinks, I have mentioned, we do not handle any other drinks besides Coca-Cola, there are other drinks, but we have never sold them. I know they are sold in other places, some of them, Afri-Cola, some of that kind, I see it in wagons on the street, hottled stuff, but we do not sell any of that at all. I think years ago, possibly just after I came to Atlanta, we sold a little Wine of Coca, for awhile, possibly. It has been a very long time ago and we have not handled it for years. The reason I say that Dope in my opinion means Coca-Cola is that everybody in Atlanta that drinks that want Coca-Cola because there is nothing else sold here except Coca-Cola. You ask a man the second time and he will say Coca-Cola, ninety-nine out of one hundred times, because they do not know anything else. So far as our particular business is concerned we have never sold anything except that extract.

Deposition of R. J. Baker, for Defendants.

R. J. BAKER.

Direct Examination.

I am 35 years of age; live at 636 Euclid Avenue, Birmingham, Alabama. Lived here about 29 years. I am in the advertising business, show [994] business now, but I was not at the time, Mr. Mayfield was here. I knew Mr. Mayfield when he was in Birmingham, that has been now, away back yonder, I never had much dealing with him until 1902, 1903 and 1904 and along there. Mayfield in 1902 when I knew him was bottling Koke over there in his place of business at 2116 Morris Avenue. I knew him in a business way a good many years before and when I went into the laundry business here I happened to get his laundry on my route and I used to have to go to his place of business to collect on Saturdays and I used to drop in there occasionally and he was a very friendly nice fellow, and he kind of liked me and I liked him and I used to stop in there socially and he would give me a drink of this Koke. It was just plain Koke, like any other kind of drink, a soda-water drink. A syrup, just like Coca-Cola, red like it, tasted like it, I always liked it. He put up a lot of different drinks around there but I never paid much attention to how many different ones he had. He had barrels he shipped it away in marked K-o-k-e, with a stencil sometimes and sometimes with a label. The color of the barrels and the kegs was just like any of these other kegs, a dark

(Deposition of R. J. Baker.)

brown-like I presume, I don't remember, in fact I did not know all this was going to come up and I never paid much attention to it to be honest with you, but I remember drinking that Koke, I used to like it, the barrels might have been a dark brown color, but I would not say for sure. To my knowledge he was there for 8 or 10 years, probably more, might have been, but I had dealing with him about three years. I could not say how long before, and he was here long after I left the laundry. The laundry went out of business, and I used to stop in there after that sometimes and he moved away from there, I am talking about J. C. Mayfield.

Cross-examination.

My present business is advertising shows, any of them that come through here, I do the advertising. I am doing the advertising for the Carnival next week, bill-posting and that kind of advertising. Before I went into the advertising business I used to be a street-car conductor [995] for years, and I had to quit that, I had to be on the outside, the work there and the rough handling of the cars is not healthy and I was in the laundry business a good deal. I have been in the advertising business since 1907. From 1902, 3 and 4 I was in the laundry business and before that I was with the street-car business. Between 1904 and 1907 I was ticket-taker with the Bijour Theatre. The laundry I worked for was the Avondale Steam Laundry. I could not say the name of Mr. Mayfield's concern here in Birmingham. He was at 15 South 20th Street when I first

(Deposition of R. J. Baker.)

commenced getting his laundry, that was on my route, that was in 1902. He moved to 2116 Morris Avenue, he had his place of business there, he was there for off and on a couple of years I guess. My dealing with Mr. Mayfield and my acquaintance with him at his place of business, was during the years 1902, 3 and 4, and I was driver and would go and get his laundry work, and he would give me a drink occasionally. He made different drinks, it might have been Cherro-Cola, might have been something like that, I don't know what else he had. It was a general bottling business. He probably may have made a drink called Celery-Cola, he had several different ones and might have had it. I saw him filling them up. I believe there were Celery-Cola labels around there. I am not sure about that. The only one I drank was Koke, because I liked that, and it was the only one I noticed particularly. I never noticed or drank the others. The first he gave me I liked and I said, "This is fine, Mr. Mayfield." He said, "Drop in and get one again." It tasted like Coca-Cola and it looked like Coca-Cola. He called it Koke, K-o-k-e, in black letters he had on it on the bottles, the bottles had labels on them, the shape of those labels was just on a square paper and had black letters K-o-k-e. That is, the label was a square label with the letters "K-o-k-e" on it in square letters. That was stuck on the bottles, about the size of Coca-Cola bottles. I never noticed the sizes. I do not know whether the bottles had caps or crowns on them, when he brought them to me they were

(Deposition of R. J. Baker.)

opened. These barrels I never noticed, I know they had different sizes and the express [996] men being out there sometimes loading up different kinds, shipping them away but I never paid much attention to them. The word sounded like Coca-Cola, and the drink was a brown drink like Coca-Cola. I have drank Coca-Cola. A good while before this I knew there was such a thing, I had seen the advertising around on signs, bill-boards. Sometimes I have the headache and I might drink some but I could not say about drinking it for pastime I never drank it. I could not say where Mr. Mayfield went from here when he moved away. I do not know where he came from when he came here. My first dealings with Mr. Mayfield and first knowledge of this drink I am testifying about, Koke, was 1902.

Deposition of M. Casey, for Defendants.

M. CASEY.

Direct Examination.

I am 56 years old; live in Birmingham; I have lived here about fifteen years; engaged in railroad contracting. I have been railroading you might say since I grew up, since I was about 15 years old, that is I have not been a contractor all the time but I have been contracting about twenty years. I know J. C. Mayfield, I knew him here in Birmingham. I should judge it has been about 12 years, I think, I knew him before that. At that time he was selling this here bottled stuff he called it Koke down here. I know he was selling that because I came in and

(Deposition of M. Casey.)

ordered it from him; I bought it to sell it for the railroad business, for our commissary. His place of business then was on Morris Avenue. I bought it for a good long while though, I believe I bought it during the time, as long as he was in business down there. I have drank Coco-Cola out of the bottles. I do not remember now the taste of this product as compared with the taste of Coca-Cola. I just bought the stuff from him and sent it out, I bought his Koke from him in them bottles you know and sent it out to the commissary, and Mayfield was selling cider to us too. He was not making any other soft drink, not as I know. This is all we bought from him.

Cross-examination.

When I was buying this stuff from Mr. Mayfield I was building a railroad, I was a contractor. I would buy the stuff and turn it over to my commissary [997] clerks to send it out to the commissary. I bought soft drinks. I bought that Koke from him, what they called Koke. I do not remember whether I ever bought Coca-Cola from anybody or not, I just used to come in and buy the stuff, order it and send it out, it just passed through my hands, I paid for it, the bills would come to me and I would pay them. I saw this Koke made by Mr. Mayfield in the bottle. I did not pay much attention to it no way. It had labels on it. I declare I could not say that I know, I don't remember what they had on them. I believe they were diamond shape, if I remember right. This was 8 or 9 years ago, the last time, it is within that time I think. It

(Deposition of M. Casey.)

was 12 years ago since I knew him, if I remember right. I declare I cannot remember the year or the date now, I know I bought it from him about 8 years or sometime before that. That is 1907 or 1908. The shapes of the bottles, why I hardly remember what kind of bottle they were in I did not drink much of it you know. I believe they had a cap. I do not remember the color of them. I was just acquainted with Mr. Mayfield and he was a mighty nice man to do business with and he gave us what we wanted. The men wanted it, you see and we sold it to them. They used to call for Koke. I didn't pay much attention to it, I bought it that way. I don't know what they called it. I understand they had calls for a drink under the name of Koke and the people asked for Koke. Mr. Mayfield did not tell me anything about making Koke. I just used to order it. The men used to come out there and ask for Koke and they would sell them these bottles over the counter. I ran the commissary, you see. I believe Mr. Mayfield made some cider, I do not know whether he made it or not there, but he sold it. I bought cider. I have heard of Celery-Cola, I do not remember who made it. I just knew Mr. Mayfield and dealt with him altogether, it was kind of personal proposition.

Deposition of W. B. Arnold, for Defendants.

W. B. ARNOLD.

Direct Examination.

I am 31 years old; live in Birmingham; lived here about 10 years. I am a hotel clerk at the Suburban

(Deposition of W. B. Arnold.)

Hotel. I knew J. C. Mayfield, first knew him the latter part of 1905 down here on Morris Avenue, Birmingham, Ala. [998] He was engaged in the bottling business at the time, manufacturing Koke and different drinks. This Koke was a kind of cola drink. I knew his son and I was in his place of business down there several different times. I went into the place where he was making this stuff; into his factory down on Morris Avenue. I saw the syrup in barrels painted red, there was labels on the barrels, they were labeled Koke, they were blank labels I believe stuck on the end of the barrels. In 1908 and 1909 I ran a soda-fountain in the Hippodrome Skating Rink on Third Avenue. Koke was the only cola drink I dispensed and a general line of soda-waters. I got that Koke from Mayfield, it come to me in *letter* barrels, five-gallon and ten-gallon barrels. They were painted red. Those barrels were labeled Koke. Our customers used Koke in asking for this drink and some called for Dope, when they asked for Koke and Dope I gave them Koke. I have been out to the baseball park here; they sell Dope and Cola Nip out there. People in asking for those drinks ask for dope and are served that bottled goods. When customers come into our soda-fountain and ask for a Koke or a Dope, I do not consider they had made a definite and specific request on me for Coca-Cola. The words Koke and Dope mean as applied to soda-fountain drinks, some cola drink. I do not think they are calling for any particular Cola drink.

(Deposition of W. B. Arnold.)

any particular brand of cola drink. I have had calls for Coca-Cola, at our fountain, when they asked for Coca-Cola I told them I did not have Coca-Cola but I could give them Koke. We had a few little signs around there, I think they were postcard signs, fancy signs with the word Koke on them. "Drink Koke, 5 cents everywhere," I believe.

Cross-examination.

On the sign was "Drink Koke, 5 cents everywhere," that is the best I can remember, the word Koke was spelled K-o-k-e. I really do not remember whether it was printed in block or script, the printed matter on those signs was black, I believe. They were not very large signs, the sign was about 6 inches wide and I suppose a foot long, something like that, to be hung up, a little hanger on the top. I had that soda-fountain out there at the Hippodrome in 1908 and 1909. I had [999] calls for Coca-Cola out there and I had calls for Koke and for Dope, and I sold only Koke. Dope is sold out at the ball park, I think it is made by the Birmingham Bottling Company, something like that, here in Birmingham, I think it was a year before last. I had heard of it before that around Birmingham, the Birmingham Bottling Company Product, that was the product that was sold at the ball park. I am not positive whether it was Cola-Nip, Mi-Cola, or what it was. I am positive that this product either Dope or Kola-Nip was sold at the baseball park in either 1912, 13 or 14, one of the years. I know it was Dope,

(Deposition of W. B. Arnold.)

I would not be positive whether it was Cola-Nip or what, there are several, Mi-Cola, and Wise-Ola. It could have been Coca-Cola. I know they called for Dope and Coca-Cola. I know one year they did not sell Coca-Cola, I am not positive what season it was. It might have been Cherro-Cola, one of those three they sold some other drink outside of Coca-Cola. Six or eight months after I came to Birmingham I met Mr. Mayfield, I met Steve his son when I first came. The label with Koke on it was black, I do not remember the shape, it has been so long ago, I do not remember. I seen Koke labels before that time, on Morris Avenue at the factory, I had been there several times, that was 1905, that was the time I saw this Koke label on the barrels, I am not positive whether it was black or not. It was a stencil on the barrels in block letters, some were stenciled and some were a label, square labels, I think, pasted on the end of the barrel, 2 inches wide and 4 inches long, and that had Koke on it. I did not see any bottle labels, I did not handle bottled goods then. I think they were manufacturing several different drinks, then, soda-water, Celery-Cola, I believe, I do not remember any other drinks, I believe Koke. I do not remember about the Celery-Cola labels. I am quite sure I saw Celery-Cola labels. The reason I remember the Koke labels, I handled Koke at the soda-fountain and did not handle any other cola drink. I do not remember about Celery-Cola at Morris Avenue in 1905. He was on Avenue B when I was buying Coca-Cola, I mean buying Koke. I am

(Deposition of W. B. Arnold.)

certain about 1909 that the labels I saw were the Koke labels. [1000] I remember the little red barrels, and he put it in little red barrels, the labels were on them. I guess it could be used as a shipping tag, it was stuck on there, that come to me was stuck on there. I did not notice any shipping tag in shipping to me at the Hippodrome. I did not pay any attention then, I was not interested. I remember the sign word Koke was on the barrels at that time but I do not remember whether it was printed on there, labeled on there or a tag. I remember it was Koke and not Celery-Cola. That was the latter part of 1905. I was dispensing soft drinks in 1908 and 1909. The name of Mr. Mayfield's business was I believe, I do not remember positively, Mayfield Bottling Works, or J. C. Mayfield Manufacturing Company. I paid cash. The word Koke was on those barrels that were shipped me at that time in block letters I believe, the best I can remember. I believe it was the same kind of label I had seen back there in 1905, only I don't remember in 1905, not distinctly about 1905. In 1908 they were block labels, stuck on the end of the barrels with Koke on them. I do not remember any other printing on there, there might have been some other wording on there but I remember the word Koke very distinctly. The shape of the label was kind of oblong like a dollar bill. The word Koke was printed on there. I did not care whether they asked for Dope or Koke—this is in 1908—at my soda-fountain, I gave them this product I had gotten

(Deposition of W. B. Arnold.)

from Mr. Mayfield. I do not remember any product here known by the name of Dope. I do not remember this Birmingham Bottling Works, this Dope Company, whether it was doing business at that time or not. I could not tell whether they are doing business now, I guess they are; they are selling a product they label Dope, that has been sold for a number of years. There has not been any interruption in that business so far as I know. I told them I did not have anything but Koke and served Koke when they asked for a Dope or a Koke. I was working for myself at the Hippodrome Skating Rink, third avenue and 21st Street, known as the Orpheum Theatre now. I only stayed in this place those years, 1908 and 9. No one worked for me there, it was only open there in the afternoon and night, no one else [1001] was on duty there but myself, I stayed there all the time. I do not remember anything about Coca-Cola, I had heard of it and drank it. I could not say how long before that I had drank it, 2, 3, 5 or 6 years, that would be around 1902 and 3. I had not heard the words Dope and Koke then. I never heard the word Koke until I came to Birmingham. Before I came to Birmingham I was at Macon, Georgia. I had never heard the word Dope around Macon, Georgia, and never heard the word Koke around Macon, Georgia. I lived at Macon about 8 years. I went to Macon at about 13 years of age. I lived before that in Kancock County; between the time I was 13 and 21, I never heard of the term Koke or Dope.

Deposition of B. P. McGraw, for Defendants.

B. P. McGRAW.

Direct Examination.

Sixty-four years of age; live in Gadsden, Alabama. I have lived there 15 years, engaged in the bottling business; have been engaged about 16 years in the bottling business. I am bottling Digestol, strawberry soda, cream, lemon and orange and some ginger-ale and Koke. I have been bottling Koke ever since 1900 off and on. I purchased it as an extract from J. C. Mayfield, right here in Birmingham. I have been bottling it ever since off and on, part of the time it would be very dull, but it was like some three or four or five months maybe I did not bottle so much of it and then again I would find out where he was, and he would write me and I would get some more and bottle it. I have not always gotten it from Birmingham. I got it from Nashville, and I got it from St. Louis, now this I got from Nashville was, I think, in the syrup form, it seems sometimes I would get him to send it to me in concentrated extract form so I could put it up myself and it was a little cheaper to me, and from Nashville, and then from St. Louis, then from Chattanooga. I first put this up in soda pop bottles, what you would call the Hutcheson bottles, that had a spring stopper in it. I was bottling other drinks at that time, 1900 and 1901. I got those bottles from the Chattanooga Glass Works or Glass Works at Tallapoosa. The bottles I put up Koke in were the same kind of bottles I put up lemon and the other

(Deposition of B. P. McGraw.)

drinks in. That was the only bottle I had to put Koke up in, that is the only kind because we only had a Hutcheson bottle, later on we began using bottles with [1002] crowns on them. All the first were plain crowns before we got any with any name on the top; later we got some with the name Koke on the top. I think that was about 1906 or 7; the decoration that was on the crown was just K-O-K-E, and the top of the crown, you know, sort of looked as if there had been a little silvery tint, a silver color with a little red ring around and then that K-O-K-E in that. The first bottles I put it up in I put labels on so you could tell what it was, tell it from sarsaparilla. I also bottled sarsaparilla. Sarsaparilla and Koke are very near the same color. The first labels I put on Koke bottles were about as wide as my two fingers, and about, I suppose, 3 or 3½ inches long, and it was white, just white paper and the K-o-k-e was just in black ink that was printed on them. At one time I had other Koke labels after which they got something like diamond shaped, white and the black ink, K-o-k-e. I did not use any labels after I began to have crowns on the bottles, because it cost so much it did not pay me to use the labels when I had the crown there that answered in the place of labels, and when it was a plain crown I would have to use them. I went to bottling with just a common plain crown and nothing on them. The first crown that came out we would get that way, then I had to label with that little label on the bottle, put them on so people would know what it was. The Koke extract would come to me in

(Deposition of B. P. McGraw.)

5 and 10 gallon kegs. The syrup would come to me about 28 gallons and up as high as 40 and 42 gallons in a barrel. These barrels were painted red. The barrels were labeled Koke. The label was possibly something like an envelope, it might not be so wide, and that had Koke on it, and then of course it was addressed to the Gadsden Bottling Works with a stencil, you know, or probably tagged. You take a stencil and dip a brush in ink or something, you know, black, and then they put that Gadsden Bottling Works on that and this here was put on the head of the Koke barrel, generally on both heads, with K-o-k-e, in a piece probably as wide as your hand and then that was tagged, something like a shipping tag only a little bit larger. After I bottled this stuff I sold it out to the merchants and retail dealers. [1003] I sold it as Koke. I have another occupation in serving churches and have been for the last 30 years, I am a Missionary Baptist preacher.

Cross-examination.

I commenced selling this thing under the name of Koke to merchants and retailers in 1900 and 1901; the first I heard of this product Koke was in 1900. I have sold it off and on continuously ever since, sometimes it might be 3 or 4 months I did not sell it and maybe 6 months there. By off and on I mean that I had interruptions of 3, 4 or 5 or 6 months at a time. I had those interruptions about every year or two, sometimes I would sort of lose out where Mr. Mayfield was at, you know, as I lost out here, when he first came here I bought it from him. The next I

(Deposition of B. P. McGraw.)

heard from Mr. Mayfield he was in Nashville, then I wrote to him and he wrote to me, then he sent me some in the extract form, one to ten, was the way it was generally fixed in the extract form. I started getting this syrup from St. Louis about 1907, 8 or 9 somewhere along there, I won't be positive, exactly. After that I got it from Chattanooga, the Central Koke Company up there, that was last year. I got it from St. Louis, I think, for about a year along in 1909 or 1910 in there. After that the next came from Chattanooga. We started that last year, using it from Chattanooga. I did not bottle any between the time I bought the syrup from St. Louis and the time I bought it from Chattanooga, I did not bottle any Koke in that interval. I had a couple of barrels the last time I got the extract and at Gadsden you do not sell a great deal of it and one barrel will almost do a year, that is, a barrel of the syrup, and I got 32 gallons of the extract, one to ten, that was the last I got from St. Louis. Now, that would last me, the way I bottle Koke, nearly two years, you know, because I sell mostly digestol, that is the principal thing that I sell, and we sell that with some strawberry, some lemon and the others, such as is commonly known. The first Hutcheson bottle was the old-fashioned pop bottle that you hit the top, and whenever it had labels on it I put that little slip on it, and then later I got the crown bottle and crown machine and crown. At first it was plain, it [1004] was plain, say about 3 or 4 years, nearly that, with the plain crown. I began to use those with the decora-

(Deposition of B. P. McGraw.)

tion on them about 1910, somewhere along there. Mr. Mayfield sent them to me, they had this silvery background and red ring around it, and the word "Koke" in the middle. The word Koke was printed in red in block type. I never had any with the word Koke in script. I am not using any of them now. I used the diamond-shaped label in 1904-5 and 6. Mayfield sent those labels, they were diamond shaped, white with black letters, a white background like with *with* Koke there in black letters, also five cents a bottle. "Drink Koke Five Cents a Bottle," I believe that was on it, that was in black ink. I first got the diamond-shaped labels in 1905 or 6. I do not know who printed them. Mayfield would send them to me every time he would send the stuff, he would ship a great big bundle of labels. I did not have any labels printed, they came from Mayfield, when he sent them. He would send a package of them. That was true of the diamond-shaped labels and the little long labels; all the labels I have used came from the Central Koke Company and J. C. Mayfield. In the last year I bought the crowns because he gave the permission to the Crown Cork and Seal people and these people now print them and sell me the crowns. Before I had to get the crowns from him. In 1900 I sold this Koke to J. W. Stone, one of them, he was in Gadsden, I don't know where he is now; another is J. W. Fowler, he is there in Gadsden—there at Attalla, I think he is there now, also J. R. Brown, he is in Attalla; Willis McMillan, I think Mc for Mc, Mellon, in Attalla; H. J. Vincent, Gadsden, he is there now;

(Deposition of B. P. McGraw.)

J. R. Robinson, Gadsden; J. T. Nugent, Gadsden. Then there are several others that I do not remember, little stands, you know, just like little stands, they would be in six months and off and gone. These sales were in 1900, 1901 and 1902, and along like that. Sometimes I got the extract from Mr. Mayfield and sometimes the syrup. I got at one time a 22 gallon keg of the extract from Nashville. I just write to J. C. Mayfield up there personally. The packages that I got from Nashville had the labels or shipping tag on that I have described and the same way from St. Louis and from Birmingham. The labels that are on the stuff that [1005] I got from the Central Koke Company of Chattanooga are about the same thing; just a shipping tag, oblong shipping tag, and it has on it, you know, I think, The Central Koke Company, I think, Koke. The same way with black letters you know. I do not think there is any change in that. There is no label to cover the end of the barrel, there is a tag on the end of the barrel and then my name—The Gadsden Bottling Works, stenciled or put there with ink on the end of the barrel and that is put on there.

Redirect Examination.

I had advertising matter of Koke. I suppose it was 4 inches wide and 8 inches long. I don't remember, somewhere, a pasteboard paper like. I hung them up and stuck them up on old stumps and trees and places around wherever I could. Koke was on them, Five Cents a Bottle, Drink Koke, Five Cents a Bottle, that is all I remember of it.

(Deposition of B. P. McGraw.)

Recross-examination.

Mayfield sent them to me. He sent them to me in 1901 and 2, sometimes when I would come down here I would get a great big package of them in 1901 and 2.

Redirect Examination.

I got them at other times besides 1901 and 2. He sent me some every time he shipped me syrup, he would send me a whole lot of the stuff and them little labels, sometimes I put them up and sometimes I didn't, the boys would tear them down so bad.

Recross-examination.

I will draw you the shape of that label, and that advertising matter on the label, that was sent to me to be distributed, and I went around and put it in different places. I would put it, sometimes it stayed up there a day, and maybe not more than 2 or 3 days before the boys would tear it down, like all the other advertising, that was in 1901 and 2 and I have received it off and on ever since from that time.

Mr. HIRSCH.—I tender in evidence this exhibit to the testimony of Mr. McGraw. [1006]

Deposition of Oliver Prince, for Defendants.

OLIVER PRINCE.

Direct Examination.

I am 27 years old; live at Rising Stave, Birmingham. I have been here practically all my life. I worked for J. C. Mayfield about 1903 and 4, washing bottles, painting kegs, sometimes, because part of the time I was not washing bottles. That was at South 20th Street, in Birmingham. I painted the kegs red.

(Deposition of Oliver Prince.)

I put in them some kind of liquid form, a syrup, Dope or Koke, or whatever you call it. We had small bottles about the size—I could not say the height, the ordinary size, just about the same as the soda-water bottles I have seen around town. I have worked for Mr. C. C. Baxter. I have worked for Lee and Cruelhaue, that is a saloon. They handle soft drinks in that saloon. Lee & Cruelhaue handle Coca-Cola. That was the only cola drink they handled when I was working there. This other place handled Dope, I believe, Mr. Baxter did, from the south side somewhere, Woochester's. I was about the place when people came in and asked for drinks, what they wanted. When they asked for Dope I gave Dope and when they came in and asked for Coca-Cola I told them I did not have it. This Dope and Coca-Cola are about the same color and all except the taste. It did not taste alike to me, I don't know how they do to other people, they have a little different taste.

Cross-examination.

I opened up the place with C. C. Baxter when the saloons first came back to Birmingham four years ago, I think. I worked for Lee & Cruelhaue up until about 3 months ago, about 8 months ago. I am in a barber shop now, The New Harris Barber Shop, located 19th Street and Second Avenue, at the Florence Hotel. I am the porter. This Dope I am talking about I do not know whether they call it Dope or not, Mr. Roocester, I think makes it, I guess he makes it now, he don't label that with a label. I don't know the name of it, whether it is Dope or Cola,

(Deposition of Oliver Prince.)

except I come in and ask for a Dope or Koke or Coca-Cola, if I ask for Coca-Cola I get Coca-Cola. While I was at Lee & Cruelhouse that was all they had. If a man came in and asked for a Dope or Koke I would tell them I have got Coca-Cola, I have not got Dope. At the other places when they asked for Koke or Dope, anything that I had, except when he called for a Dope or [1007] Koke made on the south side, I gave them that, that is this Woocester stuff, I think that is the name, I am not positive. I do not know whether it is on the market now or not. I have not handled it in about 2 years now, since I left Mr. Baxter. I washed bottles in 1902 and 3 and 4, for Mr. Mayfield, I think it was then. I do not know the name of his establishment, all I know is about his son. I don't know J. C. Mayfield. I would not know him if I saw him to-day. That place was on 20th Street, on this side, between Powell and Marsh, or Powell and A, somewhere. I was cleaning bottles for—the bottles would be dirty when they came back and we would have to wash them out. About the same sort of bottles as Coca-Cola bottles. I did not see any Coca-Cola bottles down there. I might have washed Coca-Cola bottles, I did not pay it enough attention. I never read the labels particularly. I never put it in the bottles in my life, I said they put it in there. I do not know what it was. They called it, I believe it was K-o-k-e, that is the name on the labels, on the kegs and the bottles. I said I did not see any labels on the empty bottles when they came in, the labels were round, it was a white label with

(Deposition of Oliver Prince.)

blue letters, and were put on the ends of the kegs. That is the best of my recollection. They put those on the barrels I painted red. There were labels on the bottles, also, the same as there was on the kegs, only they were oblong. Koke was on them in blue printed letters, block or square. I say, you got me, around here on everything, all about that, possibly. I did not know what they wanted. To the best of my recollection I remember I worked for Mr. Mayfield at that time. I remember that stuff was famous and everybody hollering for it, hollering for Koke. It was such a peculiar name, Koke, Kokoa, or something like that.

Deposition of Charles W. Burton, for Defendants.

CHARLES W. BURTON.

Direct Examination.

Forty-seven years of age; live in Birmingham; I have lived here two different times, I lived here the first time from '98 to 1908. The second time I came here the 1st of October, this past October was three years ago. I am now in the eating business, lunch business. In the [1008] past I have been in the saloon business, I have been in the saloon business all my life, I am sorry to say. I handled various kinds of soft drinks at my bar. I have handled at different places Coca-Cola, Rye-Ola, Cherro-Cola, Dope, Koke, and various others that I may have forgotten. I have known of these cola drinks, to the best of my knowledge, not stating exactly accurate, because I cannot say that, I should say 10 or 12 years. I was

(Deposition of Charles W. Burton.)

about the bar myself quite often so that I could hear the requests our customers made in asking for these soft drinks. Indicating the drinks they wanted people would use different expressions, somebody would ask for a Coca-Cola, some would ask for Dope and some would ask for Koke, and some would ask for Rye-Ola, Cherro-Cola,—naturally one man would ask for one thing, one brand and another another, the same way as some men would ask for booze and want whiskey. When they come in and asked for Dope I give them Dope if we had it. The Dope I speak of is the preparation that Lon Campbell puts out, the Birmingham Bottling Company put out a preparation and call it Dope. I don't know what it is. To the best of my knowledge, of course, I might be wrong on this, not being interested in it, to the best of my knowledge I served it in 1906 and 7, before we went out of business, January, 1908. At that time Mr. Houppert and Mr. Campbell were running the Birmingham Bottling Company and they put up this as one of their syrups and one of their commodities as merchandise, the same as ginger ale and the same as soda waters and called it Dope, and if my memory is right, while I was living in Memphis I remember seeing an account in the paper where they incorporated under the name of the National Dope Company. When they asked for Koke we give them this product we bought from Mr. Mayfield at one time, in fact we pushed that as much as we could on Mr. Mayfield's account. I don't know the old gentleman's name, I do not know his initials. I know Steve May-

(Deposition of Charles W. Burton.)

field and two or three of his boys, but I do not know his initials. He was in business then on Morris Avenue, between 21st and 22d, here in Birmingham. I have been to his place of business frequently. I have seen him put up his syrup; seen him have little kegs sitting [1009] around there, little red kegs painted with the name Koke on them, K-o-k-e, just sitting around his place, different sizes, but whether they were empty or full or what was in them, I do not know, I just remember seeing those packages in there. These different cola drinks I have seen in both amber and colored bottles. I do not remember at the time we were handling these particular drinks whether it come in one or the other, or whether it come in both, I cannot say. The bottles of these different cola drinks have a similarity, all about the same size, round, and I have seen them, as I say, in both clear and amber bottles, just one way and then another, in fact. I have seen mixed cases of bottles, the bottles being mixed in the case. I would not consider when a customer came in to my bar and asked for a Dope or a Koke, that he was making a specific and definite request on me for Coca-Cola. The only thing I bought from Mr. Mayfield, to the best of my remembrance, outside of this preparation called Koke, was he used to carbonate my water and put it in bottles. Carbonate the water and supplies. I used to save my empty Apolinaris Splits and White Rock Splits, and when I had saved up four or five hundred at a time, he would bottle them and put in the plain carbonated water in the bottles, and that

(Deposition of Charles W. Burton.)

enabled us every time a man asked for a high-ball at the bar, we could give him an individual bottle of plain water. I bought that from him and this Koke, that is all my memory serves me.

Cross-examination.

When a person asked for Dope and I was handling Al Campbell's product I did not understand that meant Dope entirely, and nothing else. I have heard people ask for Dope and you would set that out and they would ask for Coca-Cola. The man behind the bar is supposed to give a gentleman just what he asks for. I have heard the public ask for Dope and set it out and they would say: "I want Coca-Cola." That is since I have been out of the saloon business for a year and a half, between the intermission of 1908 and 11, I was in the soda-water business in a retail way, before I discovered this, that they would come in and ask for a Dope and they meant Coca-Cola. I come here in 1898. I handle these drinks [1010] Coca-Cola, Rye-Ola, Cherro-Cola, Dope and Koke ever since I have been here. When I first came here I went into the saloon business, I could not say, I would not like to say positively that we handled Dope at that time, or handled any one name, but we handled different things of that kind, but what the names were I am not absolutely positive of. The word Dope was not used at that time that I remember of. I first commenced hearing the word Dope about 1906 or 7. Houppert & Campbell were putting it up, the style of the firm was Birmingham Bottling Company. I was using their goods in 1898, but I do not

(Deposition of Charles W. Burton.)

know whether they were putting out a drink of that kind at that time or not, but I know they were, at least I firmly believe they were, in '6 and '7. That is the first I remember of it. I might have heard of it before that but don't remember. I first commenced handling this product Koke of Mr. Mayfield's, if my memory serves me correctly, from 1907 to about a year before I went out of business. I do not believe I had ever heard the word Koke before that time. I have no recollection of hearing it until I bought it from Mr. Mayfield. I handled other drinks before I handled this Dope of Al Campbell's and Koke from Mr. Mayfield. I think we have always handled something of that kind, but just what the names were I could not say. I have handled Coca-Cola at different times but I don't think prior to the time of these two different drinks. I have not handled Rye-Ola since 1911. I am not quite positive about Cherro-Cola, whether I ever handled that or not. I might have done that in Memphis where I was in the soda-water business. I moved back in 1909 or 10. I do not know where that was bought from. I do not know whether this Al Campbell's product is still on the market, I presume it is. After I commenced handling Dope of Al Campbell's and Koke from Mr. Mayfield, when a person came into my place of business and asked for a Dope, I gave him Al Campbell's product and if he asked for Koke I gave him Mr. Mayfield's product. I understood those to be names which apply exclusively to those two products, that is my impression, the same as if a

(Deposition of Charles W. Burton.)

man asked for any particular brand of anything, why, naturally, like a Stetson [1011] hat, I would give it to him, I supposed that was what he wanted. I do not remember anybody ever asking for Koke and saying they wanted Coca-Cola like I testified about Dope, but I presume possibly there might have been.

Deposition of G. W. Freeman, for Defendants.

G. W. FREEMAN.

Direct Examination.

I am 56 years old, live in Birmingham; lived here 23 years. I am engaged in the whiskey business. My place of business is the Forrest Club. I am president of that club. I know J. C. Mayfield pretty well, that was 1903, 2, 3 and 4, right along there, I would not be positive which it was. I knew him on the south side, Twentieth Street. My place of business was on the south side on 20th Street, right by the A. B. & A. Depot. My place of business was just across the street from him, my place of business at that time was a saloon, a negro saloon, a white saloon, and a pool-room. Mr. Mayfield was making at that time what they called Koke. I handled a good deal of it. That was bottled goods. I had occasion to go across to his place of business a good deal, I was over there frequently. I saw his son Steve Mayfield over there. My recollection is I saw some barrels and kegs over there, it seems to me they were painted red, I would not be positive about that but that is my recollection.

Cross-examination.

I called this product Koke.

Deposition of W. F. Neal, for Defendants.

W. F. NEAL.

Direct Examination.

I am 60 years old, I live here in Birmingham now, lived here about 17 years. Business, railroad building, contractor, been engaged in that business all my life since I left school. I have known J. C. Mayfield ever since I first come here, I think it was about 1901 the first time, about 15 years, I think. I happened to become acquainted with him by buying cider and Koke. I bought Koke and soda-water and the different soda-waters and soft drinks and cider, and near-beer from him. That near-beer was a hop ale. He was doing business when I first knew him on the corner of 20th Avenue and A, I believe it was, in Birmingham here, right across the railroad. I bought Koke from here until he left here. I think he left about 1908 or 9. I bought Koke for the commissary on our construction [1012] camp. These Koke bottles were labeled just Koke.

Cross-examination.

My commissary was located on different railroads around Birmingham here. I was on the Ensley Southern, and then we were on the road from Tusdaloosa up to Surle, and then I went there to Nashville on the Tennessee Central, that was up in Tennessee. From the Tennessee Central I come back to Birmingham on the Southern, from Cane Creek down the river to the Bessemer Coal Mines building a road down there off the southeast branch, off at

(Deposition of W. F. Neal.)

Boothtown, and from there, from Boothtown I went to Vidalia, Georgia, for the Frisco and from Vidalia to Dublin, and from Dublin—I think I forget now what the next line was, all the rest of the lines except the Vidalia, Dublin and Nashville were in and around Birmingham here. When I was at Vidalia, Dublin and Nashville, I was still getting this product Koke at our commissaries. I would order it in from the different places. I am still a railroad contractor but I am not doing nothing right now; railroad contractors are doing nothing just now. That product Koke was labeled just a plain label, spelled Koke, K-o-k-e. They were just black letters in block type. That Koke was on a label on the bottle; I do not remember what kind of label; I think it was just like the labels they put on all the different bottles; the different flavors; a round label, I think it was a round label with what I have described on it. I met Steve Mayfield and went down there with Steve to the plant. He said he had stuff there selling to the railroad contractors and wanted me to go down and see it. I went down there and examined it and I told him he might send me out a half dozen cases of different flavors. I was buying his entire line of soft drinks and six barrels of cider, I think. I bought Vanilla and Sarsaparilla and such as that. I bought Celery-Cola. This Koke was a different produce from Celery-Cola, there was some little difference, some darkies liked one thing and some liked another, so we had to keep the two. I did not see it

(Deposition of W. F. Neal.)

after it went to the commissary. I know it was sold in bottles. I just did the buying, paying and ordering. [1013]

Deposition of A. S. Joseph, for Defendants.

A. S. JOSEPH.

Direct Examination.

Age, 54 years; live Birmingham; lived here about 20 years. I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks and shipping hop ale then. I was in the brewery business at that time. Mr. Mayfield got his hop ale from the Alabama Brewing Company; that was the concern I was connected with. I had occasion to go to Mr. Mayfield's place of business frequently; that place of business was first on 20th Street and Powell Avenue and later on Morris Avenue. That place on 20th Street I always figured half-way between the city proper and the brewery. Owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of one hundred packages of hop ale, delivering it and later collecting on it, which brought me to his place of business sometimes twice a day for a week, and probably the following week I would not be there quite so often. I remember he was manufacturing Celery-Cola and Koke. This Koke was a soft drink; it was about the color of all the soft drinks. It seems to me the appearance was about on a par with Coca-Cola and those cola preparations. I do

(Deposition of A. S. Joseph.)

not remember what it tasted like, I don't play the game. I noticed a good many receptacles sitting around in his place of business when I was in there. His packages were painted red, on the barrels or kegs some had Koke and some had Celery-Cola. On the kegs was labeled with *a* plain black letters, block square type. The color of the label was black, the background white. A white background and black box letters. He also put up a stuff in bottles. I saw a great many of these packages commonly used by the manufacturers of soft drinks, containing so many bottles. He had quart bottles in there of ginger ale. There was a label on the Koke bottles; it was similar to the one on the box and on the keg, not quite so large; it was a white background and black block letters. Mr. Mayfield continued manufacturing and selling that product Koke during the time that I knew him, from 1900 until 1907 when the brewery was put out of commission. I am now operating the Woodward Bar, engaged in that business three and a half years. During the time I have [1014] been at that bar I have dispensed all the different colas, too numerous for me to remember the different names; some of them are Cherro-Cola, Coca-Cola, Nifti-Cola, Gay-Ola and others. I do not know how many of these cola drinks are on the market here in Birmingham; possibly 8 or 10. During my connection with the brewery I was in and out of the bars constantly and I saw these various brands of cola drinks. These other brands of cola

(Deposition of A. S. Joseph.)

drinks were about the same in color with this Koke that Mayfield was putting out. I could not vouch for the taste, I cannot say that I ever saw a cola drink that was not that general color. In asking for these different cola drinks some customers specify what they want and others do not. I hear the word Dope used very frequently. When they ask for a dope I give them the first thing I put my hand on in the soft drink line; I am about the bar myself six to eight hours a day. I rarely ever do any serving but I know what is going on. I hear the customers ask for drinks they want. When a customer comes in and asks for a dope, I do not consider that he had made a specific and definite request on me for Coca-Cola. The general impression is that all these soft drinks along that line, whether designated by one name or the other, is all on the dope order, Koke order; some call it Dope and some call it Koke. Dope means to me ordinarily a narcotic. I have an idea why they call these drinks Dope. I think the advertising that the public has got out of the newspapers at various times when these suits were brought kind of educated them along the lines of what they contain, or at least give them the impression that all these dope drinks contained some kind of dope or coke on the order of a narcotic, and they would come in and say, give me a Dope or a Koke, under the impression that they are going to get some percentage of narcotic.

Cross-examination.

Those suits I refer to, the last one I recollect was

(Deposition of A. S. Joseph.)

at Chattanooga. I think it was Coca-Cola. It was not alone confined to suits; it has been exploited in the newspapers from time to time in regard to these [1015] cola drinks. At times there are different brands mentioned and at other times it was just, I don't—a general impression that it was enough to convey that feature. The last of any consequence was in the Alabama Legislature a short time ago. I do not know whether they singled out Coca-Cola or all the cola drinks. I got my first impression on general principles; the ordinary discussion based on these soft drinks. The general discussion among the consumers of these colas is that all cola drinks contain some percentage of narcotic. I do not mean to confine it to a suit discussed in the papers. I intended that together with the other. It has been created in the mind of these people that it is the game to play, that there is a slight percentage of narcotic in these drinks, and they cannot go up against morphine or cocaine, so they play the other. That impression arose not necessarily from a discussion in the newspapers but it started somewhere. I cannot say any particular drink, but the impression has been created and still exists that all cola beverages contain a percentage of narcotic. Some drinks are more powerful than others. I never was particularly interested in this particular question or kind of business, soft drink business, but I do read the newspapers. I cannot tell what newspaper I have seen these discussions in. To be frank with you I did not come up here prepared to give any

(Deposition of A. S. Joseph.)

definite information as I did not have the remotest idea I had to answer—go thru all this program; if I had taxed my memory before coming up here, I had been given some kind of a tip as to what to get next to I probably would. When a man comes into my place of business and asks for a Dope or a Koke I give any soft drink; it does not make any difference, just the one I put my hand on. I do not consider Dope and Koke names for lemon soda, strawberry soda or anything; that is soda water, and they have an entirely different purpose. That comes under a head of entirely different beverage from sarsaparilla and lemon soda. What we give them when they ask for Dope or Koke depends upon what brand of goods we handle; we might have three or four different brands, such as Cherro-Cola, Coca-Cola, Nifti-Cola. I don't know what [1016] is contained in these drinks; I do not believe there is any formula alike. I would not say what is the narcotic in the Cocoa Bean or Cola Bean. That impression arose with regard to the impression about Koke, K-o-k-e; that it had this narcotic in it because when they speak of morphine or cocaine, they designate it as Koke. Koke would designate cocaine or morphine and the impression is that Koke has cocaine or morphine in it or something else. I do not know which one of these drinks first was on the market. My attention was never called specially to any; I remember seeing drinks in these different places. I knew of them before 1900. I cannot remember the different brands; I knew of Coca-Cola

(Deposition of A. S. Joseph.)

before 1900; I guess several years. I think I heard the expression Dope and Koke used then. These barrels and bottles I saw down there, it strikes me the label on the Celery-Cola barrels were a diamond-shaped label. You see I have got to draw on my recollection. My impression is the label on the barrel was a large label, that is the Celery-Cola, the label was round. I cannot say what type it was in. The label on the bottles seemed to be diamond shape. I was not interested sufficient to pay very much attention to the type; it is something different, the kinds of letters on the labels. I do not remember the color of the labels at all. The Koke labels on the barrels was very easy to remember; that was a label with a white background and black letters. The shape of the labels were mostly square, that is the barrel label; I do not remember the size, mostly square; it was longer than it was wide, about as large as that envelope there. He might have had larger ones on the larger kegs, it was the size of an ordinary envelope. The same label was on the bottles. I was not sufficiently interested to state the size; I remember the label, that is all. I have been handling Cherro-Cola at this Woodward Bar off and on; I handle Coca-Cola and all the different kinds from time to time. I do not know whether we ever handled Cherro-Cola. We have been handling Nifti-Cola the last 30 days. At one time we handled Coca-Cola and some other cola, together, but principally Coca-Cola. I have handled Coca-Cola by itself. When a person asked for Dope or Koke

(Deposition of A. S. Joseph.)

[1017] I gave them Coca-Cola. I have run a fountain at the Terminal Station. I had the different concessions down there; that was barreled Coca-Cola there. I had a place at five points. I handled barreled Coca-Cola there. When a person asked for a Dope or a Koke I gave Coca-Cola, but there was also a bottled Coca-Cola handled at the Terminal Station. I don't think we handled any bottled Coca-Cola there at the fountain. I gave Coca-Cola at these two fountains when they asked for Dope or Koke. That was about four years ago. This hop ale that Mr. Mayfield got out, I said it was not beer. It was not a substitute for beer, in name, you could not call it beer, and the class of people that were handling it, hop ale, did not pay any license. Mr. Mayfield was selling that product but he had a license. I do not know whether Mr. Mayfield was selling that to people that did not have license. I will say one thing, I think they had license, government license. I referred to the local license. That was from 1900 to 1907. Hop ale was a brand the brewery got out, a plain and public brand.

Deposition of Mrs. M. L. Edwards, for Defendants.

Mrs. M. L. EDWARDS.

Direct Examination.

Age, forty-four. I live near Irondale, seven miles from Birmingham, Alabama. I knew J. C. Mayfield. The first bottle of Koke—any co—anything that I sold, you know, I bought it from him in 1903, in East Thomas. At that time he was here in Bir-

(Deposition of Mrs. M. L. Edwards.)

mingham. I had a little grocery store with drinks and fruits at that time, at East Thomas, about three miles from Birmingham. Mr. Mayfield's place of business was on Morris Avenue between Twentieth and Twenty-first at that time and then he moved down between Twenty-first and Twenty-second Streets. His Koke was a drink, a bottled drink. Besides this Koke I handled all kinds of soda waters, plain soda water, and I handled Cherro-Cola, I mean Celery-Cola that I bought from him and I handled Coca-Cola, bought from the Coca-Cola Company. This Koke was in a little, slim bottle, you know, they call them splits bottles, some of them were white and some green and some darker. Those bottles had a little label about as wide as—I don't reckon it was hardly as wide as my two fingers, a little label, a [1018] white label with black letters, K-o-k-e on them. I went down to Mr. Mayfield's place of business a number of times. They had lots of little red kegs around there with the same labels on them kegs. Same as Koke labels. The labels on the kegs were larger. I had lots of customers that preferred Koke. They would come and call for the Koke. Of course, they would see it, I had three shelves, I had Coca-Cola on one, Koke on one and Cherro-Cola—not Cherro-Cola, but Celery-Cola, on one, and then at the ends I had my soda waters. I had some little signs up there. They were square, I suppose, and they were hung in diamond shape; it hung on the corner and they would hang them up on one corner and then the word

(Deposition of Mrs. M. L. Edwards.)

right in the center from one corner to the other and it would say: "Drink Koke, 5 Cents Everywhere." They would hang them on the corner and that made them look diamond shaped but I suppose they were square.

Cross-examination.

I started to say cold drinks, but they were not cold until I put them on ice. That was the reason I hesitated. I think S. T. Mayfield furnished me with these little square signs that hung in a diamond shape. He was the one that advertised them; he brought them out and hung them up and sometimes the wagon men, the men that drove the wagon, would bring them out. I got them from Mr. Mayfield and that was back in 1903 up until 1907. I went out of business then and have not been in business since then. The very first drink I bought at this little grocery store was Koke. I originated that business of mine out there. We never had anything to drink; I went in business and the first wagon that came along I bought off them. I bought Celery-Cola about the same time. I bought Celery-Cola and Koke the same day. I never had heard of them before. I was a stranger in Birmingham. I lived before in Columbus, Georgia. I have heard of Coca-Cola all my life it seems to me. I had not heard of Koke down at Columbus. I had not been in business there.

Deposition of R. W. Lochrie, for Defendants.**R. W. LOCHRIE.****Direct Examination.**

Age, thirty-three. Live 726 Tuscaloosa Avenue, Birmingham, Alabama. Lived here nine years. I tend bar at the Woodward. I have been tending [1019] bar there three and a half years,—rather I dispense soft drinks there, and cola drinks also. We are handling at present Nifti-Cola. Before we began handling Nifti-Cola we handled Cola-Nip and Coca-Cola. There is a label on this Nifti-Cola bottle but I am not positive, I think it is blown in the bottle, and there is a label on there, a diamond-shaped label, Nifti-Cola. It is a little yellow diamond-shaped label on the side of the bottle. I do not know the color of the words Nifti-Cola on there. I do not know whether they are red or yellow, the label is yellow but I think, I am certain, and I think the writing is red. I tend bar myself. Some customers call for a Cola, what they want, others call for a Dope; they come in and say give me a bottle of Dope. When they come in and say give me a bottle of Dope I give them what I handle; I give them Nifti-Cola. If a man ordered a bottle of Dope I would give him anything I had that come under that head, in that line of drink. When I was handling Coca-Cola and Cola-Nip when a customer came in and asked for a Dope, I gave him the first one I got hold of unless he specified a certain one. When a customer comes in and asks for a Dope I do not con-

(Deposition of R. W. Lochrie.)

sider he has made a definite and specific demand on me for Coca-Cola. I would take the word Dope 'myself to mean a drink that would come under the head of Cola drink, soft drinks in that line, Coca-Cola, Nifti-Cola, Kola-Nip, Cherro-Cola, anything, that is my own idea on that. I have known of these Cola drinks ten years, maybe longer, I guess longer than that I have knowed, of course, of this Nifti-Cola and Kola-Nip, I have information of only since I have been in Birmingham; I have heard of Coca-Cola all thru the country, at different places I have been. These different Cola drinks are practically all the same color, that is there might be a shade difference in some of them but then I expect they are practically the same. There is a difference in the taste of most all of them. I believe a good deal, that is, I might not name it, but I could tell one drink from the other, it is different. I never had a customer reject any of the Cola drinks I have dispensed when he asked for a Dope on the ground that it was not what he asked for but I have when he asked for certain drinks and I told him the difference. I have had them come in [1020] and ask for certain drinks and told them that I did not have that drink, but tell them the drink I have and I have had them refuse to take that one. When I set a bottle of Nifti-Cola up on the counter for a customer he ought to be able to tell it is not Coca-Cola. I could tell by the label and I could tell by the taste.

Q. What do your customers think they are getting when they are served with this Nifti-Cola?

(Deposition of R. W. Lochrie.)

Mr. HIRSCH.—I object to the foregoing question because the witness does not know what a customer thinks, he is not a mind-reader.

Objection overruled and appeal prayed and granted.

A. I could not tell. I don't really know what they do think, at least they are satisfied, I do not suppose they would take it.

Q. Do they think they are getting a Rye-Ola when they are getting this Nifti-Cola?

Mr. HIRSCH.—We object to what the customer thinks, he cannot possibly know, and I move to strike out the question and answer.

Objection overruled and appeal prayed and granted.

Q. When you serve Coca-Cola do your customers know what they are getting?

Mr. HIRSCH.—I object on the same ground.

Objection overruled and appeal prayed and granted.

A. I do not know as they could unless they absolutely knowed the taste of Coca-Cola, but I suppose if you wanted Coca-Cola and asked for Coca-Cola you would know what it was when you drank it.

Cross-examination.

If they ask for a certain drink, Coca-Cola or Nifti-Cola and I put a bottle out there in the regular course of business, and pulled off the crown, in the appearance of the bottle they could tell the difference. As a general rule the trade I have experience with don't examine the bottle. I have knowed them

(Deposition of R. W. Lochrie.)

to examine it to my observation. The crown is taken off and thrown under the bar before the drink is served. The labels do not generally come off in the ice-box. At our place we don't put them in an ice-box. They are in a chilled box; in other words we set it up with a glass and ice and the customer pours out his own drink. [1021] Nifti-Cola has a label but I am not positive whether it is on the bottle. I think that is compulsory. I don't know, I think I have heard about it. In my opinion they could tell the difference; I mean without the paper label. If the paper label was not on there a purchaser might possibly tell the difference in the taste. In appearance, just to look at it. If I could not I do not believe he could. Those labels come off very easily if they are wet. Just like a label on any bottle. There is a drink called Dope, if I remember right, but I never handled it. I thing there is a drink here now handled by certain concerns, called Dope. but if I was not working where that was and a man came in and asked for a Dope, and I was very busy and he did not specify what he wanted I would grab the first thing in a drink, Cola drink, Coca-Cola, Cola-Nip, anything I had in that line and would serve it to him and if he objected I would know what to do. I never heard the word Dope used, to give it a thought or anything, until I went to serving such drinks as these. Previous to this I was not in that line of business for I was in the dining-car service, where they do not handle any such drinks. I do not know as I have ever heard of the

(Deposition of R. W. Lochrie.)

word Dope used before I commenced handling these other drinks. I may have heard it but not giving it a thought, not working with it. The experience I am testifying about is altogether in my four and a half years.

Deposition of H. O. Adams, for Defendants.

H. O. ADAMS.

Direct Examination.

I am forty-seven. I live at Adamsville, Alabama. I never lived in Birmingham. I know J. C. Mayfield. I knowed him in 1903. I knowed him when he was in business down here on Twentieth Street right close to the L. & N. Depot. That was in Birmingham. He was engaged in the bottling business there. He was bottling a drink they called Koke and Celery-Cola and other kinds of drinks like soda-water drinks. I was engaged in the retail business at Littleton, Alabama, selling groceries, fruits, meats, and drinks. I bought some of Mr. Mayfield's products. I bought Celery-Cola and the drink—the Koke. I bought it for about three—two or three years—three years. That was bottled goods I got. It come in a little six ounce splits bottle we called them. A label was [1022] on the bottle to indicate what was in it. It said Koke and Celery-Cola. There was a label on the bottle, and spelled Koke on it, great big black letters. Celery-Cola had a label on it, too. This Koke label on the Koke bottle just letters spelled Koke on it. Printing. I called them block letters. The Celery-Cola

(Deposition of H. O. Adams.)

had an inscription around it, and spelled Celery-Cola across it. They did not look alike. It was more like writing. Customers would come in and call for whatever they wanted, a Koke, Celery-Cola, Strawberry, anything like that. They never asked for Koke by any other names than Koke. Not often; very seldom.

Cross-examination.

This Koke would come 18 dozen in what we called a sugar barrel, I believe sixteen to eighteen dozen. They would run probably six or eight dozen of Koke and six or eight dozen of them Celery-Cola, you know mixed in the barrel and through the summer-time we would probably sell a barrel a week, but in the winter-time I would not sell a barrel a month. I do not still handle that product. I am still in business. I have handled different products, something like those, Wise-Ola and drinks made out here by the Pioneer Bottling Works, the same kind of stuff. They don't make nothing but Coca-Lulu, and then for the last—that was when I was at Littleton, I sold that stuff. Now I am at Adamsonville in the retail business there. We used to handle Rye-Ola, Wise-Ola, and some other kinds of drinks, and after that I went into the bottling business, in 1907 to bottling. I was bottling up to the first of January. I shut down. There was no money in it then. We bottled what you call Queen-Ola and Wise-Ola. I got for Queen-Ola and Wise-Ola 60¢ a case and that is what I had to pay for it when I had to buy it from other people. Dope is a drink it applies to all those. If they or-

(Deposition of H. O. Adams.)

dered Koke from me what would I give them? I would tell them I did not have Koke, I had so and so. I have labels on the different kinds. Koke refers to that, a special label for that, a special name. When a person asked for a Koke and I did not have that special name I explained I had so and so, and if he wanted it I give it to him and if he didn't I didn't give it to him. Dope applies to all these kinds of drinks. Koke applies to the one drink only. [1023] When I have had calls for Koke, since I stopped handling that product, I did not give any of these other drinks, Wise-Ola or Rye-Ola. I never have handled any Coca-Cola. Oh, a long time ago, about twenty years ago I probably handled a few cases. They called that Dope then, yes, sir.

Deposition of H. L. Fisher, for Defendants.

H. L. FISHER.

Direct Examination.

Age, thirty-eight. Engaged in wholesale liquor business in Birmingham. Lived here four years and a half about. My business takes me around the bars, no other place else. I frequently hear the names people use in asking for drinks around the bar. That is part of my business, buying drinks, that is all of it now, I am not able to sell any whiskey. The bars handle all these drinks, sold here in the market. Rye-Ola, Coca-Cola, Ali-Cola and this Dope and I do not know, there seems to be eight or ten of them. I have known of these Cola drinks, it seems to like always, but oh, well, I can't remember

(Deposition of H. L. Fisher.)

when there wasn't any. The people indicate to the bar-tenders the drinks they want by asking for what they want. They call for Wise-Ola, Ali-Cola—When they ask for Dope they get I suppose Dope, most saloons handle it. I understand it is made by Smyly. Smyly is doing business under I believe Birmingham Bottling Company, I am not positive about that. I have heard people ask for a Dope and be served with Rye-Ola or these other drinks. I never heard anybody refuse those drinks as not what he asked for when he asked for it as Dope. These Cola drinks are all labeled, most of them have the name on the cap. I see occasionally some of them do not have the name on the cap but they are all labeled. I sometimes go in and ask for those drinks myself. I go in and say give me a bottle of Dope, and I get anything that he gives me, I am not expecting any certain thing, most of them, I know that have this Dope a great many of the saloons don't handle Coca-Cola and if I know that this special saloon handles this Dope I make it specific, I want Dope and some handle Coca-Cola and I ask for Coca-Cola. I do not drink very much of that stuff but when I do I usually know which one of these things the man handles and ask for the one I want. I sometimes go in and ask for those drinks at soda-fountains. I ask for Coca-Cola. I never drink anything else but that at soda-fountains, but Coca-Cola. I never ask for Dope because I [1024] want Cola-Cola. From my experience, my hearing people ask for these different drinks and

(Deposition of H. L. Fisher.)

what appears from observing the custom of the bars here in Birmingham I do not consider that when a customer comes in and asks for a Dope that he has made a definite and specific request for Coca-Cola because there is so many of those drinks that a man will go in and ask for a Dope and take any one of them that is handed to him.

Cross-examination.

I could not tell you which one of these drinks I did know of first. I do not remember. I do not remember Coca-Cola before I did any of the rest of them. I remember them all just as long as I can remember. Up in my home where I was raised in Paducah, Kentucky there was several bottling plants there and they all bottled these different drinks. I could not state specifically at all how long I have known of Coca-Cola because I never paid any attention to it except say probably from six to eight or ten years, or twelve years. I won't even approximate how long I have known them. All these drinks are labeled, they have the label on the crown, most of them do, and they label them, have a label pasted on the bottle. I am not familiar with those drinks, I don't pay much attention to them.

Redirect Examination.

I said I am not familiar with them. What I mean by that is that I am not much of a drinker of those drinks. Of course, I see them every day in my business, a great many people I ask to take a drink with me *with* take one of those drinks. A fellow will call for Dope, a Coca-Cola, a bottle of

(Deposition of H. L. Fisher.)

White Rock Water, Apolinaris, something of that kind. In my rounds of the trade here I see these bottles every day. Some of those that have the labels on them are I think this Cherro-Cola, I believe has the label on it, Rye-Ola, Coca-Cola and this Dope and then this Sam Woocester puts out a drink, I don't know what it is, I think it is labeled, I cannot recall any of those bottles that do not have labels on them. [1025]

Recross-examination.

I am not interested in any of these concerns. Absolutely no interest. This Dope, the product of a man named Smyly, is made in Birmingham. It is on the market now. I think that is labeled.

Deposition of G. G. Desouchet, for Defendants.

G. G. DESOUCHET.

Direct Examination.

I am forty-eight years old. I live here in Birmingham, formerly in Louisville. Lived here four years, pretty near. I lived in Louisville about nineteen or twenty years. I am engaged in the saloon business at the Metropolitan Hotel Bar, formerly with the Utopia Bar. I was in the same business in Louisville. I am a bar-tender. We handle soft drinks at our bar. We handle soda pop and something we call Dope. We have no Coca-Cola. That Dope, I could not tell you what it is, it is a dark liquid in a dark bottle with a light cap and dark letters on top of the cap. I have never handled in the various places I have worked

(Deposition of G. G. Desouchet.)

any other Cola drink but Coca-Cola and in Louisville Cherro-Cola and Cocoa. Well there has been a number of Cocoas with a little difference in the latter part of the name, instead of making it Coca-Cola they make it Coca—something, you know. I have known that Coca-Cola, of course, first, a number of years ago, I do not know just how long and then these other drinks came out later and for a number of years I have handled a number of Cola drinks. Customers in indicating to me the different Cola drinks they want, some of them call for a Dope and some of them call for a Coca-Cola or soda pop, but of course that is nothing like the Cola drinks. When they come in and ask for a Dope, I give them Dope. Before I commenced to handle Dope when they asked for Dope I gave them anything indiscriminately, any of the other drinks I had there. I give them anything. In our business we considered them all Dope, the whole business. This Dope that I am handling now they can distinguish it from the bottle because in the Dope it is blown in the bottle and the cap you know as I remarked before is light colored cap with dark letters. While the Coca-Cola is red, red letters on top. My Dope has no label on it, Coca-Cola sometimes has I believe a little diamond-shaped label on it. I believe, I am not positive about that [1026] because we put them on the ice and everything and when they come out you know, with the exception of the cap of course, they look very much alike and the letters on the bottle. I have never tasted either one of them

(Deposition of G. G. Desouchet.)

but I have been in the business all my life, mighty near. When a man comes in and asks me for Dope I give him Dope and if he asks me for Coca-Cola I tell him I have not got Coca-Cola but I can give him some Dope. Sometimes he says he don't want it, and sometimes he says all right, give me that. Customers ask for Dope using the word Dope. I never have them object to what I gave them on the ground that it was not what they asked for. At Louisville customers frequently came in and asked for Dope. I gave them something besides Coca-Cola, some of the other Cola drinks. I done that for the reason of the price, that it all. Not on account of the goods, that is Coca-Cola costs 70 cents up there and the other costs 50. If they came in and asked for a Dope and I gave them some of the other drinks I consider that I was giving them what they asked for. They all ask for it there. I always considered it as something besides Coca-Cola, that is what I considered when they asked for a Dope it meant something besides Coca-Cola, if they called for Coca-Cola I knew they did not mean Dope.

Cross-examination.

I do not know what they pay for Dope but up there we got it at the same price as soda pop, 50 cents a case. I am not doing the buying. I was doing it at Mr. Halley's, I am at the Metropolitan now.

Deposition of Champ Yeargin, for Defendants.**CHAMP YEARGIN.****Direct Examination.**

Age, fifty years old. Live at 810 Tuscaloosa Avenue, Birmingham, Alabama. I have been here, this is the second time I have been here. The last time was about fifteen years. I lived before I came here at Nashville, Tennessee and at Omaha, Nebraska. I am engaged in the saloon business. I handle soft drink. We handle now what is called Dope, I believe, seltzer water and ginger ale. I have been handling this Dope practically ever since I have been in Birmingham. Fifteen years, practically fifteen years. We get this Dope from Smyly. I could not tell you the name he is doing business under for I was not doing the buying, I know what he is doing [1027] business under now. I think Houppert & Smyly used to be the firm name. Before that I do not know whether it was Smyly or Houppert & Worcester, or Houppert D. Carroll, I know there has been three or four different ones in that business there, mixed up in it, but I do not really knew. There used to be on the cap to indicate what it contains. I think in late years is my recollection, it used to be smooth without anything on it, but it seems to me like in the later years it had the word "Dope" on the cap. I think I have seen a few glass bottles with the name blown in it. I do not recall that I ever noticed any label on the bottle, in Nashville, I do not think we handled anything practically, but soda water, ginger ale and it seems to me

(Deposition of Champ Yeargin.)

like it was sarsaparilla they used to call it, as well as I can remember. Up to that time I do not think we handled any soft drinks, outside of ginger ale, seltzer, sarsaparilla and sodas is all we handled. We did not handle any cola drinks over in Nashville at that time.

Cross-examination.

We pay for this Dope, I believe 65 cents a box, something like that. I am not positive, Mr. Dueker, my partner, looks after the financial end of the business, and the paying. I buy the whiskey and he does not buy any beer. We are still handling this product Smyly's product, or Houppert & Smyly, or Houppert & Worcester's product. I suppose they are still putting it out in Birmingham, Alabama. I could not be positive the first concern that put this product out. It has been so long since I have handled it. I used to pay Sam Houppert and Peter Houppert. He used to come around and it might have been his firm. I think it has been changed two or three different ones in the firm. I suppose it is the same firm, and now Mr. Smyly has been making it. So far as I know it has never been off the market. I have been out at Smyly's place of business. They have a bottling plant and put up ginger ale and sodas. I am satisfied that he keeps up Dope. I think, but I won't be positive, but it seems to me like I have seen a few bottles of Dope blown in the bottles and I have seen caps Dope. I have never seen them making syrup over there, not that I remember of. I never paid any special attention. I went up to see some of the boys. [1028]

Deposition of S. M. Tucker, for Defendants.

S. M. TUCKER.

Direct Examination.

Age, thirty-three. I live in Birmingham. Business, clerk or bar-tender, whatever you call it, at the Terminal, at 430 Twenty-sixth Street, in Birmingham. Terminal Bar. We have the Dope, Cola-Nip, Nifti-Cola, soda waters, but the Cola drinks that would be just the Cola-Nip and Nifti-Cola would not *it*, and we use another soft drink named in the Birmingham business, just Dope. Customers indicate these Cola drinks by asking for a Dope and I give them a Dope. Sometimes they will ask for a Cola, or a Coca-Cola, and I tell them I have not got Coca-Cola, but I will give you a Cola-Nip or give a Niffi-Cola, and they say all right. I always tell them we have not got Coca-Cola. They will say give me a Nifti-Cola or a Dope or a Cola-Nip. When customers come in and ask for a Dope I do not consider they are making a definite and specific request on me for Coca-Cola. Some people will not drink Coca-Cola.

Cross-examination.

Lots of people use the right names. They ask for a soft drink, they do not use any definite name, only what they are. They just use the names that I have described here. That is about all. I have never carried Coca-Cola since I have been in Birmingham. I have been at the Terminal Bar a year. Before that I was at Chattanooga, in the same line of business. I do not know anything about this Dope. I

(Deposition of S. M. Tucker.)

handled different Cola drinks there. *My* Smyly, here in Birmingham, makes Dope. He is making it now. It has got Dope on the cap. I do not think they have any labels on it. There is none of these Cola drinks with labels on them, but if they do have labels they will come off in the ice box. The labels come off in the ice-box and clog up the drain and we fellows do not like it. When they are sold over the bar I take the cap off and put it under the bar and set the bottle up on the bar with a glass and I generally pour it out in the glass. The customer does not take the cap off the bottle. When a man comes into our place of business and asks for a Dope we give this Dope all the time. I never give him Nifti-Cola or Cola-Nip. In calling for Cola-Nip and Nifti-Cola sometimes they call for it by Dope and if I have not got Dope I tell them I will give them Coca-Nip or Nifti-Cola. Dope is like a man comes in and calls [1029] for a Budweiser and if I haven't got it I will tell him I haven't but I can give him Schlitz or whatever I have. If they ask for Dope I give Dope because I always think they want Mr. Smyly's product, or they would call for what they wanted. Dope, I suppose, means the Smyly drink. To me it does, and Nifti-Cola and Cola-Nip means Cola-Nip, if a man calls for a Cola-Nip and I have not got it I tell them I have not got it but I can give him something else, something as well. I have not carried Coca-Cola since I have been down there.

Deposition of Omer Reed, for Defendants.**OMER REED.****Direct Examination.**

I am thirty-six. I live in Birmingham now. I am bar-tender at the Morris Hotel. I have been there since October, 1911. We handle soft drinks. We handle one Cola drink made here in Birmingham, that *co?co*, spelled coco. We have been handling that since I have been here. Sam Woocester makes that. Dope is the only name we have for it. They come in and ask for Dope. When they ask for Dope I give them that *Co?Co*. I never had any customers reject that Coco when asked for Dope on the ground that it was not what they asked for. There is nothing on the bottle to indicate anything about the bottle to indicate what is in there, only on the crowns, *Co?Co* on the crown. When our customers come in and ask me for Dope I do not consider they are making a definite and specific demand on me for Coca-Cola. The word dope means to me as applied to a soft drink, any of those Cola beverages in my opinion, when a man calls for Coca-Cola I would give him Coca-Cola if I had it, I would not give him Dope. We have people come in and ask for a Coca-Cola. I tell them I have not got it. They will say give me a Dope.

Cross-examination.

I do not know how this word Dope originated. It is too deep for me. I do not know how it come to be used as a name for these drinks at all. I have heard

(Deposition of Omer Reed.)

the word Dope for a number of years, ever since I have been in business, I guess, six or seven years. Before I went to the present place, the Morris Hotel, I was in Nashville. I heard the word Dope used up there. We served some Dope at Nashville. It was a black goods, I do not know what it was. I do not know where it came from. It was in use up there, this Dope. There are other names used at our place of [1030] business if they want those kinds of drinks. That is the only name since I have been here, because this *Co?Co* we handle is practically new, I do not expect there are but a few people in Birmingham who know that one drink Mr. Sam *Woscester* makes that is named *Co?Co*. I do not remember that they ever called for it that way. That is the only thing I ever hear them call for here, Dope. I have heard Coca-Cola called for here. Coca-Cola, I suppose I have had it called for in Nashville. I have known of Coca-Cola for some years. We did not handle it in Nashville and therefore I did not have calls. I have known of Coca-Cola ever since I was—ten or fifteen years, I guess.

Deposition of E. D. Montgomery, for Defendants.

E. D. MONTGOMERY.

Direct Examination.

Age, twenty-four. Live, Woodlawn, a suburb of Birmingham. Lived here twelve years. Manager of the Eastern Division of the Southern Bell Telephone Office. I know J. C. Mayfield. I knew him here in Birmingham. I have heard of him and

(Deposition of E. D. Montgomery.)

known of him practically ever since I have been here with my father. I was with him in 1908 in business, in his employ in 1908. I was what you would call, I reckon, a general man around the plant, in the shipping department, filling orders and one thing and another, bottling. Mr. Mayfield was making several different drinks, several drinks. He was making Celery-Cola, Pepsi-Cola, and he had a drink called Creme, I believe, something to that effect, and a Koke, but I do not just remember all the drinks he did put up. This Koke, I don't know what you would call it. It is just a soft drink, as I understand it, something in the nature of an ordinary beverage, just in the class of some stuff as I would say now Coca-Cola, Celery-Cola, Cherro-Cola, in that class of drink, if that is what you want. That is the completed beverage. I saw that syrup, carbonated water put in a bottle that way. He shipped syrup out to the trade. He shipped it in bottles and also in kegs. The kegs were generally painted red, as I understand it. We put labels on those kegs that we shipped this Koke syrup in. He had a label, block letters with the word Koke on them, if that was the drink that went in it, or Celery-Cola, he always labeled each one distinctly, understand. He was bottling these drinks, too, and put a small label on the bottles, a small [1031] square label with large black letters on them. He had that kind of label on Koke. Celery Cola was in a diamond-shaped label, most all except Koke, Koke had different labels from most all the rest. The labels were all practically the

(Deposition of E. D. Montgomery.)

same, that is, the same shape and color but the diamond shaped and the same color. Celery-Cola was on the label in a diamond-shaped label, like Celery-Cola is labeled now, something similar to that, or Coca-Cola, something on that style, a script style, with a long "C" that comes down under it something that long. I stayed there in the employment of Mr. Mayfield practically twelve months. His sons were around there. Carl was there almost all the time, and Steve, he was not around there a great deal but he was out most of the time in the city trade. I was there until he went out of business there, he left the city. He went to Texas, I think. He had a plant there, had a place in Texas. I go into soda-fountains now and ask for drinks of that kind. I sometimes use the word Dope in asking for these drinks. When I ask for a Dope I don't know what I expect to get. I get anything in that line of beverage, Cherro-Cola, Coca-Cola, Koke, most any other drink that is put up in that beverage, because they handle so many different grades. Dope also is used, I don't think that is used much in soda-fountains. I do not consider when I go in and ask for Dope that I am making a definite and specific demand for Coca-Cola.

Cross-examination.

I could not say what became of the business when I quit. I quit just before they got ready to leave. I do not know exactly how long, two or three weeks, something like that. The business was located on Morris Avenue, between 21st and 22d street. I could not say the number of the house. I have been

(Deposition of E. D. Montgomery.)

there a number of times since. There is a fish-stand on one side of the building. The machinery consisted of a bottling plant and syrup plant. I do not know hardly how to describe it. They had these mixers where they made the syrups, that was upstairs, and down stairs they had a bottling plant and towards the front was the office. The machinery to make up the syrups, as well as I can remember, he had this boiler. They were selling all those drinks in bottle and syrup form. They had a [1032] very large business the twelve months I was there. They had these bottling machines, I do not know what kind, I do not know what else. The bottling plant was on the same floor as the shipping department, I believe. I did most anything. I bottled. I filled the orders. I could not tell you where they got the labels from, nor the bottles. The exact shape of the Koke labels on the barrels and kegs was square, about three by four, something like that. Something very similar with the ordinary envelope, and on it was printed Koke in block type. They had on the bottles a smaller label, about an inch and a half or such matter, the same shape and the same general get-up. Most of the kegs were generally shipped back in, and they were already red but if they were not they were painted red. That is I understand the kegs were shipped back in and painted after that if they were shipped back in and were not painted. They were painted red, I don't know what I mean by "I understand," not a don't care expression, I didn't

(Deposition of E. D. Montgomery.)

use it that way. Koke and Celery-Cola were the two main drinks. We sold about the same thing of each I guess. I could not tell you how much we sold there. By large I mean the number of people we had there to take care of the business, by the number of orders it was very busy. I could not say the number of orders for Koke, it was large. I could not very well say the number of gallons a month. I could not answer that very definitely. I mean by very large, as I say, if I was in a grocery business, I would say business was good. I do not know as I would have a basis. I could not remember about any number of gallons. It was large enough to take care of the situation at that time. It was good at that time. It demanded to keep what we had there very busy all the time. We had something like six or eight men inside of the plant. I could not remember the names of them right now. Mr. Mayfield and Mr. Pogue were two. I could not tell you whether Pogue was interested in the business. There were several other fellows he had there besides myself, but I do not know them now. They had a bottling machine. I do not know what make of machine or where the labels or bottles came from. They used crowns on the bottles. I do not remember whether it was a plain crown or what. I can not tell you where we got the crowns from. I do not know much about the business. That [1033] has been about six years ago—seven years ago. I have not thought much about it, I was young, I think it was the first place I worked, that was 1908, I believe.

(Deposition of E. D. Montgomery.)

Mr. Mayfield and Mr. Pogue were in charge of the business when I left there, that was the older gentleman, Mr. J. C. Mayfield. I did not go back there. I had a position in Woodlawn in a hardware business, and I did not go back. I quit one Saturday night and went to work for the hardware store the next Monday morning. I understood Mr. Mayfield left and went to Texas. I am not sure whereabouts in Texas. I am sure he bottled Pepsi-Cola, as positive that he bottled Pepsi-Cola as these other drinks. We had crowns on the Celery-Cola bottles and I remember they were plain. I do not remember about the other drinks. I know one thing, we had a patented machine that we mashed these crowns over, made them over again. Sometimes we would get them back and that was one reason I say I hardly believe they were decorated. I do not believe they were decorated. I think they were plain. I never heard of Dope until sometime recently. I do not know how long ago. I happened to be in one of the bars and asked for a Coca-Cola, and they said, "I have not got it, I can give you a Dope." I do not know how long ago that was, approximately say two years. If I ask for a Coca-Cola I get Coca-Cola, lots of places you don't get Coca-Cola, in more than half of them you do not get Coca-Cola. I say some places sell Coca-Cola and some don't sell it. They substitute something else when Coca-Cola is called for, it may be Ali-Cola, it may be Cherro-Cola, it may be Gay-Ola, I do not know what, most anything in that line. They have

(Deposition of E. D. Montgomery.)

switched to Cherro-Cola because that is a local product. Half of them substitute, I should judge. They do not care what name they are called for, they give them something else. I have that information, however, I would not swear to it. I happened to be familiar with the drug-stores at the time, with the soda-fountains. I have discussed it, had up arguments about it not being Coca-Cola and lots of cases, some of it is shipped back, something of that kind. I happened to know of one instance where they bought a barrel of Coca-Cola and they had some argument about it not being Coca-Cola, bought through a wholesale drug-store here in town and they had it tested and so on, and wrote to [1034] Atlanta about it and a lot of this kind of stuff. I never did know. I happened to be in the conversation at the time it was argued. I heard it. I do not know what they substitute. I do not know how many there is, really, there is a number of drinks of that class. Those drinks that look alike or taste alike. For that class, they are all very much alike. You could not possibly pass sarsaparilla off, they could not get by with that. There is a class of drink, all in that same grade. I would go in one of these places and ask for a Coca-Cola, I would not know whether I got Coca-Cola or not. I do not know the difference in taste of them, just from its taste. A man's taste changes I suppose, he goes by it most. I do know Cherro-Cola is sweeter than Coca-Cola, that is about the only difference I know. Cherro-Cola is a drink made in Columbus, Georgia.

(Deposition of E. D. Montgomery.)

Coca-Cola is a drink made in Atlanta by the Coca-Cola Company. This stuff Koke that was made down here where I was working for Mr. Mayfield looked like Coca-Cola and tasted like Coca-Cola. I believe anyone asking for Coca-Cola could pass off Koke and get by with it. I don't know any instance where that was done. I did not have anything to do with that end of the business. It is quite possible to do it. There are four or five of those drinks you could set out and I could not tell you the difference to save my life just which is which. I do not know when I first heard of Coca-Cola, a good long time, I guess so far back I cannot remember. I saw it advertised all the time, everywhere you go you see it advertised. I first heard of Koke when I first went to work down there in 1908. I don't think I had ever heard of it before that. I could not say I did. I did not know much about any of them then, I was in school.

Deposition of Al E. Campbell, for Defendants.

AL E. CAMPBELL.

Direct Examination.

Age, fifty-five. Live in Birmingham. Lived here twenty-six years, engaged in saloon business. I know P. L. Houppert and Sam H. Woocester. I first knew them when I first came to the city about '89. They were engaged in bottling, bottling syrups, aerated waters, etc. Why, at that time they were bottling soda-waters, aerated waters and like products of soft drinks. In 1902 I was steward of the Southern Club and purchasing [1035] agent

(Deposition of Al E. Campbell.)

for the bar and cafe, and I put in the Houppert & Woocester products. At that time they had aerated waters, Waukesha Waters, aerated waters, sodas, sarsaparilla and a product they called Dope. I bought that Dope. I continued to buy it continually while I was steward of the club and afterwards opened up a business of mine and continued using their goods. A paper marked Defendants' Exhibit #24 is a bill of sale between Houppert and Woocester, where Woocester sold his interest in the bottling plant. I think I know Woocester's signature. That is his signature to the best of my recollection. Houppert sold Woocester's interest to Smyly, E. J. Smyly. Smyly & Houppert sold their interest to the National Dope Company. That was a corporation. The National Dope Company continued business quite a while and then I think it was 1911, the name was transferred back or was transferred to the Birmingham Bottling Company. P. L. Houppert is not living. He died October 8th I think was the date, 1911.

(Two sheets of paper marked Defendants' Exhibit #25, purporting to be letters of administration on the estate of P. L. Houppert, deceased, issued by the Judge of the Probate Court of Jefferson County, Alabama.)

I cannot say what that is but myself and Frank Seiver were appointed administrators of Houppert's estate the first day of October, 1911. After that the Birmingham Bottling Company sold that copyright to Mayfield & Mayfield. I know two Mayfields, the

(Deposition of Al E. Campbell.)

ones they transacted their business with was Steve Mayfield and J. C. Mayfield.

(A paper marked Defendant's Exhibit #26, purporting to be a deed on that business to Mayfield & Mayfield, signed A. E. Campbell and Frank Seiver, as administrators of P. L. Houppert, deceased.)

That is my signature and Seiver's signature. It happened that I and Mr. Seiver made this deed to Mayfield & Mayfield as administrators of the estate of P. L. Houppert, First, on account of failing when the business was transferred to Smyly and afterwards transferred to the National Dope Company, the whole, the entire assets of that business was transferred in a lump to Houppert and Houppert failed to have it recorded in Washington that this copyright had been transferred to this company, [1036] with the balance of their effects. And, to make the title clear we as administrators of the estate had to assign it direct as an asset of Houppert's. The Birmingham Bottling Company authorized the sale of this business to Mayfield & Mayfield. The actual consideration that Mayfield & Mayfield paid for the business, trademark, etc., my impression is four or five hundred dollars, I forget the exact amount, but it was not over five hundred dollars. Mayfield & Mayfield after they got this business and trademark, etc., deeded it back to the Birmingham Bottling Company and the rights, all their property which had been deeded to them and the rights in Jefferson County for that copyright. The right to use that trade name and

(Deposition of Al E. Campbell.)

sell the goods in Jefferson County. The entire property was deeded back from Mayfield & Mayfield. Everything.

(Paper marked Defendant's Exhibit #27, purporting to be a certificate of registration of the Trademark "Dope" in the Patent Office.)

This is the paper that was in our possession at the time we made the sale.

Mr. LITTLETON.—I tender and offer in evidence the papers which we have marked Defendants' Exhibits 24 to 27, inclusive, as evidence on behalf of the defendants.

Cross-examination.

The firm was composed of Sam H. Woocester and P. L. Houppert. The name of it was Houppert & Woocester. It was in '89 that Houppert went in with Woocester, Woocester had the business prior to that time and they were bottling a general line of soda-waters, ginger ale and all that kind, and they still continued under that name of Houppert & Woocester and with the same men as partners up until 1905. They had a plant, assets, a business, and goodwill. In 1902 they put upon the market a product which they called Dope. That is my recollection. I was steward of the Southern Club and bought Dope. It had a crown on it, is my recollection, with Dope on it, on the crown, and they had a sale for it. It was a carbonated beverage. Peter L. Houppert died about October 8th, 1911. I think that was the date, 8th or 9th, one of the two. In the meanwhile Woocester had sold out to P. L. Houppert.

(Deposition of Al E. Campbell.)

pert. He sold that interest immediately. [1037] That is Houppert sold to Smyly, E. J. Smyly. That is Mr. Smyly who is still in business here in Birmingham, and the firm was called then, Houppert & Smyly, and they still continued to enjoy all the real estate and assets, including the plant and the whole business, and that whole plant was owned by Houppert & Smyly, that included the trademarks and all of that kind of thing. They manufactured that syrup, Houppert & Smyly. They continued to manufacture a carbonated beverage under the name of Dope. They had that word Dope on the crown and at the same place, and marketed it around Birmingham just as they had before. I think it was 1907, I am not positive whether it was 1906 or 7 that there was a corporation formed and that was called the National Dope Company. That corporation took over the entire plant, business, and assets. They continued to manufacture and sell syrups, soda-waters and aerated waters, etc. Just the same thing that Houppert & Smyly had before and they manufactured the syrup did they. Made it there in the plant. Houppert bought Woocester out previous to that. They had the syrup. I do not know who manufactured it. Houppert & Smyly were manufacturing it when this National Dope Company was organized and that was put in aerated beverage and called Dope. After Mr. Houppert died his interest continued in the business until 1913. Mr. Houppert was a stockholder in the National Dope Company and president, and the interest he had for-

(Deposition of Al E. Campbell.)

merly had in the partnership he continued as a stockholder in the corporation, and he continued to manage it as president, and they continued that corporation, the National Dope Company which they had organized without interruption and operated the entire business formerly operated by Houppert & Smyly. The National Dope Company made the syrup, this syrup Dope. They sold the acrated beverage Dope. Mr. Smyly was a stockholder. Houppert was president. There was for a time interested in that Dope Louis Schillinger. Louis and myself and a man named Smyly. Satterfield was interested later on. I think treasurer was my position and that situation continued until in 1911. It was not a different corporation from the National Dope Company. They just took over the business. The name of the corporation was changed. There was not any change, only some of the stockholders.

[1038] The business was continued at the same place and had the same assets and did the same thing and the stockholders in that concern were P. L. Houppert, myself and E. J. Smyly, and Leady. He was not an officer, just a director. There was a time prior to the death of Mr. Houppert that Mr. Smyly sold his interest to Satterfield and afterwards I think that was in the latter part of 1911, he bought it back. My impression was Smyly got dissatisfied. He just went out and came right back in. That was the National Dope Company. He was back again in the Birmingham Bottling Company. The stock that Houppert owned was sold to the

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Birmingham Bottling Company, sold to the corporation, and the corporation went on right ahead as before operating the plant, making the syrup and same goods, and holding the same assets except that it was then owned as stockholders by myself, Mr. Smyly and Mr. Leady. Still made this product Dope and labeled it Dope and sold it around Birmingham. I did not make the syrup, the company made it. The Birmingham Bottling Company is still in operation. I am still interested in it. I am still secretary and treasurer. We still operate the same plant and make the same class of goods. If it has been changed much I do not know anything about it. Smyly does the manufacturing. They occupy the same premises and use the same machinery, making this product Dope, selling it around Birmingham and making the syrup just the same as it always has and there has been no change at all that I know of.

Q. There has been offered in evidence a copy of the trademark registration No. 63,033, in the name of Houppert & Woocester, of Birmingham, on a carbonated beverage which shows the word Dope and the date of that application was May 11, 1905, and the date of the certificate is June 4, 1907, it was signed, the affidavit was signed by Sam H. Woocester and the application by Houppert & Woocester, by Sam H. Woocester, a member of the firm, and there it was set out that Houppert & Woocester, a firm domiciled in the city of Birmingham, county of Jefferson, State of Alabama, doing business at Ave-

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nue C and Twentieth Street, in said city, composed of the following members Sam H. Woocester and P. L. Houppert, et cetera; now, [1039] this evidently belonged to the firm of Houppert & Woocester, am I right in that? A. I understood it was. I was not a member of the firm at that time, but to the best of my information they composed the members of that firm of Houppert & Woocester. Woocester on June 16th, 1905, sold his interest in the business for \$5,000.00 to P. L. Houppert. That, of course, included the trademark Dope. That was understood. He says, as that bill of sale there says all the assets and this was an asset and that belonged to Mr. Houppert and Mr. Woocester had sold his interest in it. Mayfield & Mayfield's attorneys that was making this purchase found some defect in the transfer and they requested us to make a deed. The transfer to Houppert and to the Birmingham Bottling Company had not been recorded or something of that kind. The trademark had been transferred to the Birmingham Bottling Company but there had not been anything recorded in Washington and to correct that the administrators of Mr. Houpperts' estate made the transfer. When we sold or executed this contract to Mayfield & Mayfield we trasferred this copyright to the trademark Dope. We transferred the business and they took a deed from the—Mayfield & Mayfield, back for the business that we had here and also the trademark for Jefferson County. We did not turn the plant over to them. He transferred it back to us on the

(Deposition of Al E. Campbell.)

same day. That transfer is in writing, I think in the office of the company. I have not got it in my possession. I can get it. I will get it and produce it if it is in the possession of the Birmingham Bottling Company. We had no real estate. The plant was transferred to Mayfield & Mayfield and the business was transferred to Mayfield & Mayfield. Read that paper there, that is the only thing, in making an instrument of that kind was to perfect the title to this trademark. We went through the formality, that is about the size of it. Mr. Mayfield did not come in there and own that property. He did not actually come into possession of the safe and what it had in it. I think we would have resented it if he had attempted to exercise any ownership. It was not understood as being a trade, but only to perfect the title to this trademark. That was all Mayfield wanted, this certificate of registration and that was all we sold him. We went through [1040] the formality of selling him the goodwill, business and all that.

Mr. LITTLETON.—I wish to interpose an objection to the evidence as to what occurred because the contents of the instrument is the best evidence of what occurred.

Objection overruled and appeal prayed and granted.

Although I have very little recollection of the entire contents of it, there was nothing at all turned over except the certificate of registration, which was all Mr. Mayfield wanted and all we intended to sell

(Deposition of Al E. Campbell.)

him. It was necessary to go through with this elaborate performance because it was conditions raised by their attorneys, Mayfield & Mayfield's attorneys, by Mr. Johnson. He has an office here, R. B. Johnson, he is a patent attorney, a trademark attorney. He advised that it was necessary to do these various things to get a technical right. I do not know whether this deed that was given back was ever recorded. I do not know whether it was sent up to Washington to be recorded. I am not positive whether the Birmingham Bottling Company has signed an instrument to Mayfield & Mayfield, as a corporation; they originally did. The first paper that was turned over, the papers were turned two or three different times, before they satisfied this attorney but I do not know whether they did or not this last time. The Birmingham Bottling Company is making this product Dope now and using this trademark. I do not know whether we are making it under the same formula we always made it under. I do not manufacture. Mr. Smyly makes it. It is made here in Birmingham. I do not know of any change. We are manufacturing this product, and using this formula under the rights we got from Mr. Mayfield, that is just the instruments that were passed between them. Anything that is done is shown in the instrument. As an officer of the Birmingham Bottling Company, the Birmingham Bottling Company gets its rights to manufacture this Dope syrup from Mr. Mayfield and his companies by the transfer that was made. The National Dope

(Deposition of Al E. Campbell.)

Company and the Birmingham Bottling Company have a formula which they used in the manufacture of this preparation Dope, which we sold, and that that formula has been the same right along. That has been my understanding of it. We [1040 $\frac{1}{2}$] had the formula right along. We did not transfer any formula to Mr. Mayfield. From what I understand, my answer to that is that we are using practically the same formula we have used all along. If there are any changes made, it has been done by Smyly without saying anything to us. So far as I know the formula has always been the same thing. That formula originally was sold to us by Mrs. Brown, Mrs. Diva Brown. She claimed to have been an ex-wife of Mr. Mayfield, J. C. Mayfield. We bought that formula, I think that was 1907. Before that our product was being manufactured in the place by Peak. I do not know what his name was. In 1907 we went to manufacturing by this formula we now have and now are using. In 1902, I know, I have been around connected with the concern and Houppert just called the drink Dope. That is a long way back, I don't quite remember. I know he was calling his product Dope at that time. I was buying from him then. In 1907, I do not like to go back that far. Understand this, I have never been connected with the concern in an active way, in any way except in the short while that I kept the books, that was in 1911. I have owned stock in the concern but only go around the concern just occasionally. So far as I know I do not know of any change. I understand,

(Deposition of Al E. Campbell.)

my recollection is those papers—the paper was originally made up and signed by the Birmingham Bottling Company and turned over to their attorney and since then there has been several changes and I have lost sight of the original paper and I do not know what became of it. That was the last paper that was made up there. Exhibit #26, signed by myself and Mr. Campbell, I was asked to sign this paper to make the title clear. I do not understand it that it took the place of anything, that was only perfecting the title.

Mr. ROGERS.—Mr. Littleton, I wish to have it appear in the record that I shall probably want to ask Mr. Campbell some more questions when he produces the document I have asked for.

The WITNESS.—I do not know whether we have the originals of those or not.

Mr. LITTLETON.—What he is talking about is the license for Jefferson County.

The WITNESS.—Oh, undoubtedly Mr. Smyly has that in his possession. [1041] I have no idea the number of the trademark registration. Mr. Mayfield came to me and asked me if we did not have that registration and I told him that we did and he wanted to know what we would take for it. Nothing was said at that time about any property other than this registration. Myself and Smyly agreed upon terms with Mr. Mayfield. The actual consideration was about five hundred dollars. Then came the question of how the title was to be made. We were selling this trademark, or thought we were, to Mayfield & May-

(Deposition of Al E. Campbell.)

field for five hundred dollars. I think he was advised by some lawyer that it was necessary to take over the entire business. I think that was the understanding, that must have been his advice. We executed an assignment which carried the entire business and goodwill as well as the trademark. We did not sell him the entire business and goodwill for five hundred dollars, and immediately there was a bill of sale given by Mayfield & Mayfield back to the Birmingham Bottling Company. The consideration for that was one dollar and that included everything but this trademark and the rights on that trademark in this county. What was actually sold in that transaction for five hundred dollars, was the trademark and nothing else. No business actually passed and no property, tangible property was transferred. How much was that business, goodwill and property of the Birmingham Bottling Company and Houppert & Woocester worth, I have never thought of it, but possibly I would say, in fact I know the business would inventory about eight thousand dollars. At the time we made this transfer I did not disclose to them the formula under which the product was made. Nobody else did so far as I know. No formula was included in that contract from Mayfield to us or to the Birmingham Bottling Works. After the assignment I and the Birmingham Bottling Company and the successors of Houppert & Woocester, continued business just as we had before. We do not buy any syrup from Mr. Mayfield or the Koke Company, Southern Koke Company or any of those Koke Com-

(Deposition of Al E. Campbell.)

panies. We still make the syrup over there. We make it according to Mrs. Diva Brown's formula so far as I know. I knew Messrs. Houppert & Woocester in 1902. That was my first recollection of this product Dope, my first recollection of their putting [1042] out a Cola product that they called Dope was in 1902. It was somewhere right along there. I got my dates from the fact that I went to work for the club there along in November, I think, of 1902, and I began to buy the product from these people at that time. I was buying something, it was either right at that time or the following spring, I was buying a product that Houppert called Dope. He made an application and he had that application in for that for several years. I knew he had quite a time getting that, too. I was in the bar business prior to that time. I had never heard of the word Dope before they began to use it. I do not recollect as I ever heard of the expression Dope before. That is a long time, it might have been used and it might not have been used. I do not know whether I had heard of the product Coca-Cola before 1902 or not.

Q. 301. I thought you stated, Mr. Campbell, which is a fact, isn't it, that the Birmingham Bottling Company continued to use the trademark Dope after the sale to Mayfield & Mayfield, and are using it to this day and are now using it? A. Yes, sir.

Q. 302. On a product that was and is manufactured by the Birmingham Bottling Company? A. Yes, sir.

Deposition of A. F. Watkins, for Defendants.**A. F. WATKINS.****Direct Examination.**

Age, thirty-two. Live, 2818 Juniper Avenue, Birmingham. Lived here at Birmingham thirteen years. I knew J. C. Mayfield. First met him right here in the city, in Birmingham. He was engaged in the bottling business, manufacturing of syrup. He manufactured Koke, Celery-Cola, and I think he manufactured extracts, some extracts, I do not recall their names. I was over to his place of business quite a good deal. I saw barrels, kegs and stuff of that kind. They were painted red. He labeled all of his stuff on the barrels containing this Koke syrup, he put the word Koke, a label, broad and square label, block letters, with the word Koke. He bottled that Koke, too. He put it up in at one time, I think a kind of tapering-necked bottle more like an Apollinaris Splits, more like something of that kind. He put labels on those bottles. On those labels was the word Koke as well as I can remember. I knew Mr. Mayfield from that time up to about six years ago, he left the city. I do not know where he went when he left here but I have been told that he went to Dallas, Texas, in fact, he and his son told me that they were in Dallas. I knew his sons. He continued to manufacture that product Koke up to the [1043] time he left here. I am manager of the Burnick Billiard Academy at the present. I have been in the advertising business up to two weeks ago, for the last eight years. I have seen advertising of this product Koke

(Deposition of A. F. Watkins.)

in banner form and paper and streamers, banners, cloth, and paper, too. Whatever it takes to make the signs, whether it is in cloth or paper, it is streamers or banners. I have been in the advertising business about eight years. I placed advertising for Koke. Mr. Mayfield gave me one advertisement for Koke about seven or eight years ago, seven years I guess, about now, as well as I can remember, in the Jefferson Theater program, of Koke. These advertisements I speak of, the streamers and that stuff were in all conspicuous places where the public could see, along the thoroughfares and things of that kind in Birmingham and out of Birmingham. I imagine this was about ten or eleven years ago. I do not recall the amount. I remember seeing it but there was a good deal of it, as well as I can remember, quite a lot of it.

Cross-examination.

He placed an advertisement with me for Koke; I won't be positive about this time, it was during the Jefferson Theater season there, seven or eight seasons ago. I put it in there. The advertisement went into the theater program and that Jefferson Theater is still running, still in existence. It was located at that time at the same place it is now. I do not remember the extent of the contract, at that time I was getting out the programs for the Murphy Advertising Agency. It is out of existence. Robert E. Murphy was connected with the Murphy Advertising Agency. He is with the Durant Mineral Company here in Birmingham. I do not know as I can describe them,

(Deposition of A. F. Watkins.)

except to call them banners. They were streamers, advertising. I should generally imagine a streamer would be anywhere from one foot to six inches in size. You can make it three feet or eighteen inches, up to thirty feet by three feet. I do not exactly remember the size of them. They were placed on public thoroughfares, as well as I can remember. I saw them from the street. I cannot exactly remember what public thoroughfares. These streamers were cloth. If it is an advertising streamer it has got to have printing on it. You could not take a blank piece of stuff out there and make a flag or a streamer out [1044] of it. You can have it that way, you know what a streamer is.

Mr. LITTLETON.—I wish to interpose an objection to this form of cross-examination. The witness has explained two or three times what he means by a streamer and counsel keeps asking if a streamer is a piece of cloth, of any kind of cloth, or any size, when the witness has already designated the size of the streamer.

Mr. HIRSCH.—In reply to that I beg to say that although Mr. Littleton might know from the witness' testimony what a streamer is, the examiner does not know.

I told you I did not know what size that streamer was. If the Coca-Cola Company are that much interested, they should have gone around and measured up the streamers. They were about two by six or two by four, something like that. They were tacked in conspicuous places, I do not remember where I saw

(Deposition of A. F. Watkins.)

the streamers. I might have seen them on the side of a house. I just remember seeing them with the word Koke, that was on them. This is not for the record, but they looked about as if a hen had stepped in water and then went across it, you don't put that in. It might have been that way, but the Koke was in block letters printed on it. I do not recollect anything that was on the streamers, gentlemen, but the word Koke. It was advertising the drink and it had other words on it relative to the drink proposition. I cannot remember what other words it had on it. I do not exactly remember now the name of that firm down there I frequently went to. I remember the kind of labels that were put on the bottles. If I am not mistaken it was the J. C. Mayfield Manufacturing Company. I won't be positive of that, but as well as I can remember that is what it was. Their business was located on South Twentieth Street, when I first remember, and then they moved over on Morris Avenue. The label was not exactly square, I won't be positive whether they were square or a little longer than they were broad, I won't be positive about the shape of the label, but it seems as well as I can remember they were practically square. I imagine they were about the size of a large envelope, about 9x4 or 8x4, something like that, in block letters. I am not positive about whether it was [1045] blue or black, or what color it was. I said I thought they were in block. I am not positive about the color. It might be blue or black. When I first met these people I was out at the university high school, as well as

(Deposition of A. F. Watkins.)

I can remember. I do not know exactly whether that was right or not. The University High School here in the city of Birmingham. I am not positive as to the shape of this Celery-Cola label. I am not positive, either, as to the way the celery-cola was printed. I do not remember whether that was script or block. The word Koke was in block. I did not shoot craps for a living. I lived off the interest of my money, until about eight years ago I went into the advertising business. I am still in the advertising business. I am by myself. My concern has not got a name. I have my own business. It is located 552 Brown-Marx Building. I am by myself. I took up the managership of the Burnick Billiard Academy eight weeks ago. I have not gone out of the advertising business. I have been in several different businesses, with Spurrell Hodges Installment business, that is a form of advertising, though. I do not recall when I was with this Spurrell Hodges concern. I came from Indianapolis about five year's ago. I left there and came down here, too. I was in Indianapolis about four months. I was with that concern about a year. I told you I had seen the streamers once, last and all the time. I saw the streamers, and if you want to know it you had better write it down, put that over there. I saw them ten or eleven years ago. I have not seen them since. I was in Birmingham and more or less I have seen advertising of their different lines, lines of their Celery-Cola, Koke and other extracts. Besides those streamers I have seen paper stuff, tacked stuff. I have seen some paper

(Deposition of A. F. Watkins.)

stuff, they sent hangers out and things of that kind that they put up. That was about the same time, ten or eleven years ago. I do not think I have seen anything since they left Birmingham but I have seen them right along up to the time they left Birmingham. I do not know the date they left Birmingham. I could not tell you the family history. Up until about eight years ago I frequented the place pretty often. Off and on I saw different classes of advertising. I did not say all of it had Koke on it, no.

Q. Did any of it have Koke on it?

A. How the hell do I know. [1046]

Redirect Examination.

Mr. Mayfield also advertised his other drinks Celery-Cola, and these other products. I have seen these other products advertised, I think, not in this class, but with the label on it, on the barrel head, and I have seen them labeled.

Deposition of W. H. Brandes, for Defendants.

W. H. BRANDES.

Direct Examination.

Age, thirty-four. Live 713 South Tenth Street, Birmingham, Alabama. I am in the saloon business. I am a bar-tender. I have been working behind the bar about sixteen years. I am working at the Florence Hotel Bar, the bar at the Florence Hotel. We dispense soft drinks at that bar, ginger ale, seltzer and Dope. We handle no Cola drinks there besides this Dope. I suppose Dope is made by Mr. Smyly. Birmingham Bottling Works is on the package top,

(Deposition of W. H. Brandes.)

Birmingham Bottling Works. I have known of that product Dope that I am now handling ten or twelve years, something like that. Ten or twelve years ago it was Houppert & Woocester. We handled some of it back there. I have not handled it continuously since then, but I have handled it off and on, some places I have handled it, and some places I have not. To me it has the same taste now it had before, and has the same color it had before. It is the same drink so far as I know. Customers come in and call for it, whatever they want, they come in and say give me a bottle of Dope, call for whatever they want. When they call for a bottle of Dope I give them a bottle of Dope. When they come in and ask for this Dope I know that they want this Dope, by their calling for whatever they want, at other places when they come in and I have handled Cola-Nip, Rye-Ola or Coca-Cola and they come in and call for it, if I have not got what they call for I tell them I have not got it, and they will say; "Well, give me whatever you have got." They have indicated that they wanted this specific product. They come in and say give me a bottle of Dope, and they will say, is that dope? I say, "Yes, sir," and show them the crown, show them the bottle, the crown on the bottle, and when they have called for the others I have done the same thing with the others you know, when they came in and asked for a Dope, I showed them the crown with the Dope on it. When they came in and asked [1047] for Dope, and I showed them the crown with the Dope on it, they indicated that that

(Deposition of W. H. Brandes.)

was what they wanted. I do not know how many Cola drinks there are on the market here. There are quite a bunch of them, I guess I could recall a lot of them. I see the wagons and see it advertised.

Cross-examination.

I suppose Mr. A. E. Campbell is connected with the bar I am with. I suppose he is one of the proprietors. He is one of the owners. The last time I have been there since last September, I was there once before with Werthheimer; Werthheimer owned it at that time. I think we were selling Dope then. I am not sure; I think we did. We were not handling Coca-Cola. We did not have Coca-Cola, at least I don't think we did, but we were handling—I don't know whether it was Dope or Rye-Ola or whatever it was, I do not know. I could not say. I left Werthheimer a while and then went back. I went down to the Mecca Bar in this city. I handled there Cola-Nip and Coca-Cola. When Dope was called for, I told them I did not have Dope. I told them that I had Coca-Cola and Cola-Nip. I could not say exactly when I first heard of the word Dope, ten or twelve years ago. I do not think I heard anything of the term Dope before that. I might have. I do not think I heard the word Dope, but after it came out I heard about it, here, and handled it afterwards when I worked for Dunker Brothers. The first work I ever done was in the City Market, and then I went to work for Werthheimer, old man Werthheimer, on Fourth Avenue and Ninth Street. That was sixteen years ago. That was a saloon. I think he was

(Deposition of W. H. Brandes.)

handling soft drinks. I do not know what, that was too long ago; I could not say. I do not think he handled Coca-Cola. I could not say; I could not answer that. It has been too long ago. I finished there about six years ago. That was the first six years after my work at the market; that was for old man Werthheimer, that was at First Avenue and Sixteenth Street. The name of the place was Miner's Retreat, and then the Grotto. I do not think I ever heard the term Dope used there at all. After I left there and went to work for his son, and his nephew out in Ensley. That was a saloon. I do not remember whether they handled any soft drinks. I do not remember whether I ever heard the word Dope there. [1048] I think I went to work then for Dunker Brothers, the same line of business. They handled Dope at their place. I think that is the first place I handled Dope. I do not remember whether it is the first place I recall ever hearing the term Dope, that has been so long ago now, but I know that we handled it there and had calls for it there. That was about 1905, or '6, when I started working there and then after I left there we had prohibition for four years. Prohibition was here, I think, at the beginning of 1908. While prohibition was on I worked for the A. G. S. That was the railroad. I went to the soda-fountains a few times. I go to the ball park at Birmingham, the base-ball park. I have heard them say give me a bottle of Cola. I do not know as I have heard them say a bottle of Koke, only when I buy it, I drink some myself. I call it Coca-Cola. I guess

(Deposition of W. H. Brandes.)

I have heard them call for Dope, give me a bottle of Dope. I do not know what they serve out there; I do not think I have heard of any of these drinks besides Coca-Cola out there. I think this product I refer to as Dope was originally made by Houppert & Woocester, here in Birmingham and then by Houppert & Smyly. I do not know who makes it now. I guess Mr. Smyly makes it now. It has been on the market right along here in Birmingham since the first time I heard of it. It is on the market now. It has the word Dope on the crown as it always had. It used to have labels on it, if I remember right. It had labels on it about six or eight or nine years ago. I do not remember exactly whether anything else on it or not. Dope was on the label. D-o-p-e, like it is on the crown now. It is the same as it is now on the crown, the letters as best I can remember. The way I remember it now, he had something on the label, a girl, and I believe it is the same as it was then. I will have to get you a crown and look at it. It has the word Dope on the crown. It was on the label. It has almost always been the same. At least I think they are the same on the label as they are on the crown. I never heard the word Dope until I heard it in connection with Houppert & Woocester's and now Houppert & Smyly's product. The word Dope is printed on the crown, red, a sort of silvery crown. I do not remember what a Coca-Cola crown looks like. If customers ask for a bottle of Dope, it is served to them in [1049] the bottle. We have a box under the bar for the crowns. We have an opener

(Deposition of W. H. Brandes.)

fastened on to the bar, and when we open the bottle the crown will drop down into a box under the bar for it. I do not know how much this Dope made by Houppert & Smyly cost. I do not do the buying. Mr. Campbell and Mr. Fabian do that.

Deposition of John Smith, for Defendants.

JOHN SMITH.

Direct Examination.

I am forty-eight years old; live in Ensley, Alabama, a suburb of Birmingham. I have been right there ten years. I lived before that in Thomas. I stayed there nine years. It is out here on the north end of the car-line, I stayed, that is suburb of Birmingham. I know Mr. J. C. Mayfield. I think, as near as I can remember, I first got acquainted with him, it was about 1903, I think, somewhere along in there. I was in the works and had a little store in the cafe that I run, and I got acquainted with him just about that time. It was a cafe and it was a grocery store. About that time he was on Twentieth Street and about that time, and I bought all my drinks from him that I used at that time. I bought from him Koke and Celery-Cola was all I bought. I continued to buy that Koke and Celery-Cola from him close to four years, if I am not mistaken it was about four years. I am agent for the Semont Solvia Company at Ensley, I am labor agent and also run a store and cafe there in the yard, in the same building now. I am a stockholder in the Penny Savings Bank.

(Deposition of John Smith.)

Cross-examination.

This business I am engaged in is a by-product plant they call it. They have coal they burn and the by-products are taken from that. I have been with them ten years. I was with them around 1905. I knew Mr. Mayfield first in 1903, and bought this Celery-Cola and Koke for four years, I guess that is about right. I only handled it when he was here. You did not understand. You see I stayed in Thomas nine years, there, nine or eight, somewhere along there and I moved from there to the Semont Solvia Company and I have been there ten years. I have been in this State about nineteen years. I do not think I have ever handled this product Koke since I have been with this Semont Solvia Company. I [1050] handled no other goods from Mr. Mayfield at that time besides Celery-Cola and Koke. That was about all he handled. He did not have anything that I knowed of, if he did and if I bought some other stuff from him, some other bills—I am not excited, I stutter, you see. And this was during the time that I used any of his products. I was up there to his place of business almost every day, myself and I just gave the orders for whatever I wanted if I come into his place. I do not think I ever send any written orders because I was up there every day myself. I think I bought the stuff from him, here at Ensley and when I bought all the stuff I bought from him it was out there, that was while I was staying in Thomas. Sometimes he hauled it out and sometimes I hauled it out. If I had a horse of my

(Deposition of John Smith.)

own I hauled it myself. He always sent it out by dray mostly, except the times I took it out. I paid cash when I ordered. I do not think he had a collector to come out and take our orders. I ordered, I was in Birmingham almost every day and I went around to his place of business and placed my orders mostly. I could not tell what else he was making at that place of business because I did not pay any attention to all the stuff he made. I do not think they sold any product known as hop ale. I never bought any. I may have seen some stuff by the name of Creme, I do not know, it has been a long time ago. I believe he did have a product named Pepsi-Cola. I do not think I bought any of that but I think he had Pepsi-Cola. I remember Pepsi-Cola all right. I was never arrested for selling any of Mayfield's products. I have never been arrested in my life. I do not think I had a Revenue license, a Government Revenue License while doing business and buying goods from Mr. Mayfield at any time. I did sometime, some one time, but I don't think I had them when I was handling his goods. I was buying some stuff, I forget the gentleman's name, but he stayed on First Avenue and if I was buying some hop ale from him at that time I had Revenue License; I do not think, really, I had any for Mr. Mayfield at that time. I do not remember to be positive with you, to tell you the truth. I do not think it was during the time I was buying from Mr. Mayfield. I think it was either before or after that. I could not tell [1051] you just exactly. I will

(Deposition of John Smith.)

have to study it up, but I know I had some but I do not really know whether it was the time I had them when I was in for ordering his or not. I state positively that I was never arrested for selling any of Mr. Mayfield's products. I never saw any whiskey around Mr. Mayfield's place or any light wines of any character or any beer. I could not tell you what was in his place these times, I would not be telling you something right. I did not pay any attention to it, to just go around and examine things. This Koke from Mr. Mayfield came to me in cases. In the cases there were bottles. I think about 24 to the case. I do not remember whether there was anything on the cases at all or not, but they had it on the bottles. They had Koke on the bottles. It was in a little, bitty, small piece of paper and the paper over the crown. They had K-o-k-e on the paper. Now, let me see and show you what it was in; I think it was just a little star. I think it was a little square thing like this. I am not speaking of label on the crown. I think there was a crown on the bottle, had to be pulled out, a stopper or some way to keep it from coming out. I do not believe there was anything on the crown. I believe it was one of these tin crowns like they use on the bottles now but it did not express anything on the crown at all. The label was pasted on the bottle, was a small thing, I suppose about like this. It was a very small label and it had on the label K-o-k-e. It was not in black type like the Arcade Theme Tablet. It was that style about like that (indicating), the word

(Deposition of John Smith.)

Koke was stamped on there, it looked like. It seems like it was stamped on there, that is the way it seems to me. [1052]

Deposition of A. E. Campbell, for Defendants.

A. E. CAMPBELL.

Direct Examination.

This is the deed or assignment of the business and good will of manufacturing and selling this Dope syrup that I was asked with reference to yesterday, from the Birmingham Bottling Company to Mayfield & Mayfield (Defendants' Exhibit No. 28). I know Mr. Smyly's signature. That's his signature. This is the exclusive license for Jefferson County granted to the Birmingham Bottling Company by Mayfield & Mayfield. That is Smyly's signature and mine (Defendants' Exhibit No. 29). That is my signature, there, attesting the papers as secretary of the company. Offer in evidence as Defendants' Exhibit No. 28 and 29, the papers above referred to, as evidence on behalf of the defendants in the above-styled causes.

Cross-examination.

The actual amount of money that passed was between four and five hundred dollars. That was all. Mr. Smyly whose name is signed to these documents is president of the Birmingham Bottling Company. He lives here in Birmingham. He is in the city now.

Deposition of E. J. Smyly, for Defendants.

E. J. SMYLY.

Direct Examination.

Age, forty-five. Live in Birmingham. Lived here twenty-five years. Engaged in bottling business. I am bottling soda waters and Dope and almost all kinds of aerated waters, seltzer water. That Dope comes under the head of Caffeine drinks, a Cola beverage. I have known of that product, Dope, to the best of my recollection about fifteen years, when I was working for Houppert & Woocester. I think they were making it fifteen years ago. I acquired an interest in the business of making and selling that syrup in 1905. Prior to that time Houppert & Woocester dissolved partnership. Houppert took the business. Woocester sold out to him. I bought a half interest from Houppert. We did business under the name of Birmingham Bottling Works. When we first went into business together it was called Houppert & Smyly, Birmingham Bottling Works. We stayed in partnership until we organized the National Dope Company and we continuously made this product up to that time. [1053] After we organized the National Dope Company the business good-will, etc., was transferred to that company. We formed a stock company. The National Dope Company manufactured and sold syrup. We continued under the name of National Dope Company until sometime in January, the latter part of January, 1911. After that we reorganized and incorporated under the name of

(Deposition of E. J. Smyly.)

Birmingham Bottling Company. The Birmingham Bottling Company manufactured and sold this syrup after that. After that, we sold the rights, excluding Jefferson County, I mean not including Jefferson County, to Mayfield & Mayfield. That is the instrument. That is my signature there as president. That correctly states what was sold to Mayfield & Mayfield. I turned them over the accounts, to Mr. Steve Mayfield, the accounts I had on the books, and the customers we had been shipping to prior to that time, the customers out of this county. This Birmingham Bottling Company were making other products besides Dope—a general line of soda waters. We just sold Mayfields the right to make Dope. After that the Mayfields gave us back a license, an exclusive license for Jefferson County to manufacture and sell that product in this county. That is it (Defendants' Exhibit #29). I made the syrup all the time. No particular change in the formula was made, only we changed the way of making it. We used to, at one time, make it out of a green syrup but afterward got to cooking it in a kettle and mixing it in a tank. Mr. Houppert bought a formula from Mrs. Diva Brown. That formula was not very much different from ours. She specified in her formula that we had to cook the syrup, boil it, mix it in a mixing tank, where we had been making it in a barrel. We had trouble with the goods souring before. It would sour on us, the way we were making it out of green syrup. The product we made prior to the time of buying this Dive Brown for-

(Deposition of E. J. Smyly.)

mula, so far as taste is concerned, tasted about the same, a caffeine drink. The color was the same. At the time of this sale to the Mayfields I showed him the formula. The formula we had been making it by and [1054] he said he knew the formula, Steve did, his mother—the woman who was Mrs. Brown, was his mother, she had formerly been Mrs. Mayfield, was practically the same formula, he said. When I was working for Houppert & Woocester, they used a label marked Dope and after I and Mr. Houppert began doing business together we used a label and we used the crowns afterwards, we used labels at first and afterwards got a decorated crown. When I and Mr. Houppert sold to the corporation, the National Dope Company, the instrument evidencing that sale was in writing. It is the label we used to mark Dope with (Defendants' Exhibit No. 30). I have not the assignment from myself and Mr. Houppert to the Dope Company. It would be in the minutes I suppose—Mr. Letardy was the attorney, A. Letody, I believe. A representative of the Coca-Cola Company called on me. There is a gentleman sitting over there at the table, Mr. Pierce, there, the chief detective of the Coca-Cola Company.

Mr. HIRSCH.—We object to that, and move to strike the question.

Objection overruled and appeal prayed and granted.

I did not know he was a detective. He represented himself to me to be an attorney, I believe, or

(Deposition of E. J. Smyly.)

Mr. Stewart told me he was an attorney. Mr. Stewart is auditor for the Coca-Cola Company. I cannot remember the conversation exactly, but he talked to me and wanted to know in regard to whether Mayfield & Mayfield—I believe the Koke Company, what they bought from us and so forth, if they bought the particular trademark. He said they were getting up evidence to try and put them out of business, or have the word Dope excluded at Washington.

Cross-examination.

I was not a member of the firm or interested in any way in the firm of Houppert & Woocester. I was connected with them only as an employee. My job over there then was manager, looking after the plant. I first went with that firm about 1900, I should judge, somewhere along there. When I first started to work for them there was not any cola drinks on the market then, much here, but one or two possibly. Coca-Cola was not on the market. [1055] I believe they were not bottling it here at that time. I do not think—I am not positive, that they were on the market here at that time. If I remember right Mr. Whitehead opened up a bottling plant here and operated with another man, a Mr. Johnson, who took it over afterwards, is to the best of my recollection. I think Coca-Cola was on sale at the soda-fountains. I think it was advertised, I would not be positive, that was so far back. I acquired my interest in the firm in 1905. Mr. Woocester sold out to Mr. Houppert and I acquired part of Mr. Woocester's interest. That was in 1905. The firm name when I

(Deposition of E. J. Smyly.)

bought in was Houppert & Smyly, Birmingham Bottling Works, Houppert & Smyly, proprietors. That continued until the National Dope Company was organized. That was in 1909. It existed until the Birmingham Bottling Company was organized; we reorganized and changed the name to the Birmingham Bottling Company in January, '11, and since then the business has been conducted as the Birmingham Bottling Company, that is a corporation organized under the laws of this state. The location of the place of business has been in the same place all the time, it has never been moved, and the National Dope Company was making this general line of soda waters, as well as selling the preparation Dope. Houppert & Woocester and the Birmingham Bottling Works did not ship syrup. They made the syrup, however, for their own use. When the National Dope Company was organized, they commenced shipping syrup, they increased the capital stock and began making and shipping the syrup. The Birmingham Bottling Company shipped some, but not much. This Exhibit No. 30 was first used. They used a label all the time because they did not have the decorated crowns, even when it was Houppert & Woocester. It was a label something similar to that, only it was in a block type, to the best of my recollection, instead of being red it was in black. I think they were made here in Birmingham. I had the label changed myself when it got to be Houppert & Smyly. That was about 1905. I think, the best of my recollection is I had them made at the Alabama

(Deposition of E. J. Smyly.)

or at the City, I [1056] cannot state which, they used to do my work, the Alabama Paper & Printing Company and the City Paper Company. The label Exhibit 30 was begun in 1905, to the best of my recollection, somewhere along there. I cannot state who printed it, I do not know whether they sent away and gave them the order or they made them here. I think it was one of those companies I have just named, either the City Paper Company or the Alabama Paper and Printing Company, I believe is the style of the firm. Those firms have all changed. The transaction between our company and Mayfield & Mayfield, Mr. Campbell done most of the negotiating, I believe, I was sick at the time. I was in the hospital. He knows what occurred, he was secretary of the company. I was around. We talked it over together in regard to selling out the right for the use of the name. The proposition was that Mayfield & Mayfield, Steve Mayfield and J. C. Mayfield wanted to buy this registration. That is this registered trademark Dope, and the result of the negotiation was that they purchased this trademark. We continued in the use of it since the date of that transfer and are doing it now. I make my own syrup as I always did. I have not changed the formula. I did not sell them my tanks. I sold him some stuff there, but he said he did not need it and he just left it there, it was included in the bill of sale—some mixing percolators and so forth. I think they are over there at the place in the warehouse. I suppose Mr. Mayfield was mostly interested in this registration.

(Deposition of E. J. Smyly.)

I would not have sold out my business for \$450.00, and the \$450.00 that was paid does not represent the purchase of the Birmingham Bottling Company. I do not know what it would exactly inventory at now. I might sell it for eight thousand dollars. It was in mighty bad shape in 1913. We did not sell the business because we were making other things, we were making all kinds of soft drinks, soda waters, and we continued to manufacture this product Dope, just the same afterwards. They deeded that back to me for Jefferson County. This registration that we sold to Mr. Mayfield or Messrs. Mayfield & Mayfield, states that the first use of the [1057] word Dope by Houppert & Woocester was in the year 1903. Mr. Woocester filed the registration papers himself. When they first commenced putting up the Cola drinks, they called it those days, they called it Dope. Houppert & Woocester, I do not know whether they started in 1900, or the exact year they started to sell because I have no record of any sales that was made before them. It might have been that was when we started putting it out, in 1903. I don't know whether I ever heard the word Dope used at that time, that has been so long ago it is beyond me. We sold it under the name of Dope, Celery-Cola and all those drinks were being manufactured around here at the time and they called for them under the names they were put out under. I should judge I had heard of Coca-Cola at that time, in 1903. I do not know whether I ever heard Coca-Cola called for under the name of Dope, or not in 1903. I have

(Deposition of E. J. Smyly.)

been at the ball park and heard people say, give me a Dope, and the boys would go ahead and sell it by the name of Dope, under the name Dope, until they stopped them and made them sell by the name of Coca-Cola. Coca-Cola is a product sold at the ball park exclusively now, I think. I do not know whether Coca-Cola was spoken of and asked for as Dope in 1900 or not, that is beyond my recollection, 15 years ago. When Mr. Pierce called on me, Mr. Stewart was with him, I think. He represented himself as auditor for the Coca-Cola Company. I believe he said he was auditor for the Birmingham Coca-Cola Company. That was some time last year, I believe. It was about August 21st, 1914, some time in August. I sold the goodwill along with the trademark. This sale consisted of the name Dope and the formula. I showed them the formula. He had the same formula, practically the same formula and said it was the formula. Mr. Mayfield said it was practically the same formula. He knew my formula for the simple reason that he had made it with his mother. He said it was the same because he had made it with his mother. I gave him all my accounts, the National Dope Company had, the people they had shipped to throughout [1058] the south, during the time they shipped syrup, the list of accounts, customers we had done business with a couple of years, up to '11, along there. Between 1911 and 1914 we had not shipped any of this syrup. I did not sell them machinery. There were some percolators that I sold. They did not take those.

(Deposition of E. J. Smyly.)

Mr. Pierce represented himself as a lawyer. I did not know him, and Mr. Stewart presented him to me, that he was an attorney for the Coca-Cola Company and wanted to have a talk with me. He had been down there once before, he said they were not after me. The National Dope Company was the last of the concerns I was connected with, that sold any of this syrup out of Birmingham in bulk. The Birmingham Bottling Company might have sold a little, I cannot say as to that, but I turned over the accounts, we used the same books, we kept on with the same books, the Birmingham Bottling Company did, that the National Dope Company had and I collected up some of the accounts after we had reorganized. Those accounts that we turned over to Mr. Steve Mayfield, I think, had been made by the National Dope Company before the name was changed to the Birmingham Bottling Company. They were on the books of the Birmingham Bottling Company. Some owed some accounts and I just gave him the list of them. I could not say the number. I had the bookkeeper make them out on a slip of paper. There might have been a dozen or two dozen. They were people that the National Dope Company had shipped to a couple of years before. I think I myself turned it over to them, to Mr. Steve Mayfield. They were names that our association, the National Dope Company, had sold this Dope to, while they were shipping syrup. It was made right here under that formula that Mrs. Mayfield or Mrs. Brown sold them, the same formula we had been

(Deposition of E. J. Smyly.)

using all the time. I think it was purchased in 1909. The formula we used from 1903 to 1909 came through Mr. Worcester, he was the man that made all the extracts. I do not know where he got it from. I cannot tell you any detail or difference between these two formulas. The only trouble we had with the [1059] syrup was souring, as I said, we changed around, anybody makes changes you know. They were practically the same formula, just some little change we made with regard to mixing and cooking the syrup. The body of the drink was about the same, a Cola drink, a caffeine drink. I manufactured under the same formula. I was the mixer, manufacturer, that was my business while I was with the Company. While I was away Mr. Satterfield was making them. We put the same ingredients in under both formulas. We used practically the case oils. I do not remember whether it was exactly the same quantities or not. We changed the quantities quite often, in any kind of syrup, sometimes we find a little less acid or something of that kind will make it better, we change most any time. The National Dope Company was incorporated, I think, in January, 1909. It was either '08 or '09, I cannot say positively. I never hunted up those dates on it. It was changed to the Birmingham Bottling Company, to the best of my recollection in January, 1911, and after that it operated as the Birmingham Bottling Company, and is operating yet as the Birmingham Bottling Company.

(Deposition of E. J. Smyly.)

Redirect Examination.

They stopped the boys at the ball park from calling Dope when Coca-Cola was sold out there. They used to call for it like base-ball people call for Dope, they would go out and sell it, the boys would go out and holler Dope, you know, and afterwards they made them holler Coca-Cola, call cold Coca-Cola. I could not say who stopped them. It was not me nor anyone connected with my concern. I had nothing to do with it.

Recross-examination.

We might have sold at the ball park a number of years ago but not since Mr. Johnson has had the contract with the Coca-Cola Company.

Deposition of J. L. Drake, for Defendants.

J. L. DRAKE.

Direct Examination.

Age thirty-one. Business soda dispenser with Nunnally Company, 318 Twentieth St., Birmingham, Alabama. Held that position about thirty days. I was with Nunally & Company before that on Nineteenth Street, in Birmingham. [1060] Soda dispenser there. Have been a soda dispenser for about ten years. I have dispensed Coca-Cola. That is the only one. I have heard of several other Cola drinks on the market, quite a few. Some of them are Rye-Ola, Gay-Ola, Cherro-Cola. If I had Coca-Cola in the fountain and Ry-Ola in the fountain together, not in the same container but in the same fountain and a customer should come in and

(Deposition of J. L. Drake.)

ask for a Dope, I would give him the one I made the most money out of, if he asked for a Dope. If he asked for Coca-Cola I would give him Coca-Cola. If he asked for a Dope and I served him with Rye-Ola, I would consider I gave him what he asked for. I would consider I was making more money and it would cost me less than the other product. I do not consider Dope specifies any particular drink. I have never termed it that way. The taste of the completed beverage Coca-Cola as dispensed to the public over the soda-fountain is not always the same. Sometimes the pressure in the water is not good, you do not get a good drink out of it, sometimes you get a barrel of Coca-Cola and it leaks and you get something on top of it and get something in there, bad water, something in there that makes it taste awful bad. Ice sometimes makes it sweeter than at other times because you get a smaller amount of water and sometimes they are careless enough to put more syrup than should be in your ice, and you do not get the right amount of carbonated water to make a good drink.

Cross-examination.

I have always served Coca-Cola when Dope is called for. They have several slang words used for calling for these drinks. Some of them say Dope, some say Koke, some say—I don't know what all they don't say, and these slang words, whenever they used them, wherever I have been I served Coca-Cola.

Redirect Examination.

I handle root beer at our fountain. It is made

(Deposition of J. L. Drake.)

by the John Hungerford Smith Company. I have never dispensed any Hires' root beer. I was in stores where it was dispensed. Hires' root beer is extensively advertised. If they specify Hires' [1061] root beer, we have not got it, but if they just ask for root beer, if they do not specify Hires', we give what we serve. If I had two root beers, this root beer I now have and Hires' root beer, and a customer came in and said, give me a root beer, I would give him the cheaper article. I would consider I had given him what he asked for. There is no Coca-Cola advertising in any place, where I am working now. There never has been any there so far as I know.

Recross-examination.

I refer to this Atlanta Coca-Cola.

Deposition of Edward J. Ople, for Defendants.

EDWARD J. OPLE.

Direct Examination.

Age thirty-three. I live at 1112 Sylvian Avenue, Birmingham, Alabama. I have been living here since November 17, 1899. In telephone business. I occupy the position of clerk. I go into soda-fountains, or places where soft drinks are sold and ask for them. Cola drinks on the market are Cherro-Cola, Coca-Cola and several different bottled drinks, I am not familiar with the adopted name. I go into soda-fountains and drink those drinks. I usually walk into a soda-fountain or saloon and ask for a Dope. When I ask for a Dope, I expect to get most any of them. I mean by a Dope, several different

(Deposition of Edward J. Ople.)

bottled drinks, not a specific drink, what the substance of it is I cannot say. When I go into a soda-fountain and ask for a Dope, I do not consider that I am asking the dispenser specifically and definitely to serve me with Coca-Cola. In my opinion I would believe that the drinks that are bottled constitute a Dope, that is if served to me I would consider they are applying to what I call for, drinks of that kind. If I were served with Rye-Ola or Ali-Cola or anything of that sort, I would consider that I was getting what I asked for.

Cross-examination.

To the best of my recollection about eight or ten years I have been hearing the word Dope. I heard it in New Orleans, Atlanta, heard it in several outlying towns. I make the small country towns. It applies to soft drinks. I could not specify any particular drink it was applied to first, just speaking of the then bottled drinks of that sort, to the best of my recollection, [1062] was when Mr. Thomas and another gentleman who is here now, I just cannot recall his name, but I believe he is still in the bottling business around here, and I believe Mr. Gresham knows him, and he opened a place here on Morris Avenue, it was not Morris Avenue, it was the other side of the railroad, between Seventeenth and Eighteenth Street, they were stopping at that time, I was working at the Metropolitan Hotel as hotel clerk and they were staying with me, to the best of my recollection that was about the time the word Dope originated. Peak & Thomas was the firm

(Deposition of Edward J. Ople.)

name. That was the first I heard of Dope. I have heard of Coca-Cola practically ever since I have been knowing myself. I believe I knew Coca-Cola before I knew any of the bottled goods, before any of the drinks I have discussed. I do not remember back further than eight or ten years ago about the word Dope.

Deposition of C. N. Baker, for Defendants.

C. N. BAKER.

Direct Examination.

Age seventy-seven years. Live here in Newman, Georgia. Lived here fifteen or sixteen years. Engaged in bottling business, engaged in that business nearly ever since I have been here. When we first began to bottle, we did not bottle anything then but what we called soda water, lemon, strawberry and creme. Since then I could not name all the different colas I have bottled. I bottled the drink I got from Mr. Mayfield called Koke, Mr. Jim Mayfield there. (Indicating Mr. J. C. Mayfield.) I do not recollect now where we got the syrup from. I think we bought it from Nashville or Birmingham *one*. We put that up in seven-ounce bottles, six and seven ounce bottles. The name of that drink was Koke—K-o-k-e. We put a label on the bottle, Koke. I think Mr. Mayfield sent the label when he sent the syrup. The syrup came to me in kegs, or half barrels, I do not know which now. The containers of all the Colas I ever received were red. I first bottled along something in 1900 and something. It was

(Deposition of C. N. Baker.)

a good while ago. It has been some eight or nine years, I reckon. Since then I have bottled Cola-Queen, I called it, and Mi-Coca and Coca-Nola, Rye-Ola, and I [1063] —I don't know how many, every drummer that come along I had to take at least a trial package. The syrups for all these different drinks came in barrels and kegs. They were painted red. There is not but very little difference in all these Cola drinks in taste and color, if any. It takes a mighty close expert to tell the difference. I have a boy who can tell the difference, if there is any, but he does not do nothing but mix and bottle and of course he knows when he gets hold of them. There is no difference in the bottles of these different drinks any way except the name blown in them. The names the purchasers who want to buy a bottle of this stuff, use in asking for it, some will call for a cola, some for a Dope. I have sold a many a one for Dope. I reckon I have sold a fourth of what I put up for Dope and they got to calling it Dope until the Coca-Cola Company got to advertising it on everything, you know, to call it straight Coca-Cola. On this Dope question, you know, they would fool them in it and they are advertising, you will find it now, I expect, around town here where they advertised to call it by name, straight Coca-Cola. About half the men come in now in our town, and get to where they don't hardly call for anything, they go into the box and case and look like that, and get what they want and pull the stopper off and drink it. I tell my customers around town they don't need to have a

(Deposition of C. N. Baker.)

clerk, to set it out, but all the men could wait on themselves, but of course when I don't know that you call for anything, well if you come in and ask for a Dope it don't make any difference what you have, you give it to him, I do, always did. I never had anyone reject what I gave him on the ground it was not what he asked for.

Cross-examination.

This product Koke from Mr. Mayfield come by freight, I reckon. Sometimes they sent it on this West Point Route, sometimes on the Central. Mr. Mayfield sent me some labels, my recollection is they were that broad, as your two fingers. It went about half way around the bottle, a six ounce bottle. I do not recollect any label or shipping tag on the barrel. I guess there was, I do not recollect though. I do not know how that name of [1064] Koke was printed. It was K-o-k-e. That is all I recollect.

Deposition of Thomas C. Banks, for Defendants.

THOMAS C. BANKS.

Direct Examination.

Age, 66. Live in Newman, Georgia. I have lived here three years last October. Before I came here I lived in Atlanta. Engaged in the Railway Mail Service, been in that business 29 years. I have lived in Atlanta for twenty-five years, twenty-five—twenty-six years. I knew E. H. Bloodworth. He is my father-in-law. I went to Atlanta before he did. He came there, I think, in '87, perhaps, or '88. He went to live with me, he lived and occupied the same

(Deposition of Thomas C. Banks.)

house at 8 Woodward Avenue. We lived practically together most of the time. He came there to go into business with Mr. Mayfield, Mayfield & Pemberton, in the medicine business. He came there, it must have been in mid-winter, December or January, I do not recall the date or day. He went in business with them. They were making Coca-Cola, Koke, Stillinger, a blood medicine, and lemon and orange elixir, mustang liniment, queen hair dye and globe flower cough syrup. I recall those. Well, perhaps something else, I have forgotten about. They were making Wine of Koka, putting it up in quart bottles. They formed this partnership, these four parties, the latter part of '87, I think. This product Coca-Cola was a drink, prepared, a soda-fountain drink, color of it was a dark mahogany, you might say, dark color, not black, but brown, dark color. It tasted like the Coca-Cola you get now, practically the same taste. I had occasion to go down to the places of these people frequently, occasionally. Pemberton Medicine Company is what it was. The Pemberton Medicine Company, that is the beginning of it, they may have changed it afterwards. They did not make Coca-Cola very long. I often went down to the place of business during the time they were making that. They were selling it, shipping it around and selling it to soda-fountains. They put it in small kegs and jugs that I saw. The kegs were painted red. The kegs were marked Coca-Cola, in comparatively large letters. After that I think they commenced making a similar preparation called Koke.

(Deposition of Thomas C. Banks.)

That was after they had been in business [1065] for a little while. If there was any difference between this preparation they called Koke and the preparation called Coca-Cola, I could not tell it from drinking it and looking at it. It appeared to be the same. It was supposed to be practically the same product, I think, under different name. The reason they changed the name, I think, was Coca-Cola was little known then and I think Koke was a kind of new coined word with them, they changed because it was more attractive and shorter. I talked to my father-in-law, talked about the new word, the new drink Koke and so on, the new name for it, in other words that they did have some trouble with Dr. Pemberton, I think he was away a good deal and sick, in bad health. Mr. A. O. Murphy lived in Atlanta then, out on Washington Street, just diagonally across the street from me, only a short distance, less than one hundred yards. He did not stay in that partnership long. He left there, it seems to me, during late summer. I do not know exactly what time during late summer. He left there permanently, went back to Barnesville. Mr. Mayfield and Mr. Bloodworth continued the business. They continued to make the same product called Koke. They continued to label it just like they had done before. I cannot recall the time of the year when Dr. Pemberton died. He died later on, that is after Murphy had left there, perhaps in the Fall. Mr. Bloodworth and Mr. Mayfield, after Dr. Pemberton's death, divided the business, I think, divided

(Deposition of Thomas C. Banks.)

with Mrs. Pemberton, that is they gave her one-third of the manufactured products and all those kind of things and she took them, she took charge of them. They gave her Wine of Koka and various things, I think. I do not know exactly what they gave her, whatever they had on hand, manufactured stock, the manufactured goods. She took them away from there and had them stored at Candler's drug-store, I think, at the time, or they had them stored for her. By "they" I mean Mr. Mayfield and Mr. Bloodworth, they had it in charge. Mr. Mayfield and Mr. Bloodworth after that continued the business. Continued the manufacture [1066] of proprietary medicines and so on. They continued to make Koke. I don't know when they ceased, they kept on making it, I think. Mr. Bloodworth continued to be connected with Mr. Mayfield in that business until 1888, perhaps later. He sold out. I do not remember when he left there. It was later than that, perhaps a year, the last of 1887 or the first of 1888 that he began to do business with them and when he left there I cannot recall that date. They were doing business when this partnership, Pemberton Medicine Company, started up, out on Pryor Street. They eventually moved to a little residence cottage on Trinity Avenue. They must have stayed on South Pryor, or Pryor Street before they moved to Trinity Avenue, nearly a year. After they moved on to Trinity Avenue, Mr. Bloodworth was still connected with Mr. Mayfield in this business. They still continued to make Koke on Trinity Avenue. They made the same

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preparations as they did at the other place. I remember the instance of Mr. Bloodworth and Mr. Mayfield dissolving partnership, it must have been something like a year after that or more. Mr. Bloodworth left Atlanta, I cannot say now about the year, those things have been a good while ago. He left there after he went out of business with Mr. Mayfield but I cannot recall the date. When Mr. Bloodworth and Mr. Mayfield dissolved partnership, Mr. Mayfield kept this Koke product. Mr. Bloodworth sold out to Mr. Mayfield. That word Koke prior to that time had never been applied to a soft drink, that I ever heard of. As a word I had never heard it, a new word, I think it was. It seemed to be a kind of new uncomplicated and short catchy word. I had never heard it before. When the partnership was first formed, I was down there from time to time. I was down there on the occasion of their bringing machinery and stuff to start business with. I cannot say where they got it from, I do not remember now. I remember they were fixing it up. In fixing this product called Coca-Cola and then Koke, they used copper boilers, probably ten or fifteen gallons, something like that. They used a tank, a wooden [1067] tank, to make the Wine of Koka. Mr. Mayfield, I think it was, that actually mixed the syrup, this Coca-Cola, and later this Koke syrup. He learned from old Dr. Pemberton, I suppose he was there to instruct him. I cannot say I ever saw the contract of partnership. I heard them discuss it and all, but so far as reading the contract I cannot

(Deposition of Thomas C. Banks.)

say I ever read it. Do you remember what they said was in the contract?

Mr. HIRSCH.—I object to the foregoing question because it calls for hearsay testimony and any answer to it is hearsay evidence and I move to strike same.

Objection overruled and appeal prayed and granted.

They came in possession of all those formulas, for all those different drinks and proprietary medicines, in possession of all of them.

Mr. HIRSCH.—I object to the answer on the ground that it is merely hearsay and move that it be stricken out.

Objection overruled and appeal prayed and granted.

Cross-examination.

The latter part of the year '87 and the year '88 I was in the Railway Mail Service in and out of Atlanta. The last part of '87, and during the entire year '88, that is the time I am testifying about here. Part of the time I was located in Atlanta in the superintendent's office. I lived there. Mr. Bloodworth was my father in law. I saw them making Coca-Cola myself. I saw the labels Coca-cola. That was in 1888, along in the spring time, summer. The labels on the kegs were about the size of that (indicating), and the letters were a kind of block letters, Coca-Cola in block letters. There was a hiatus between Koke and Coca-Cola. The color of the printing was black. Coca-Cola was in black. The label was

(Deposition of Thomas C. Banks.)

painted on the kegs, I believe. The jugs, I think it was a paper label, it must have been that long (indicating as long as the witness' hand). I do not remember what else was on the kegs. I do not think there was any name of the manufacturer. I think the name Pemberton Medicine Company was on the label. Coca-Cola was in block type and printed in black. I think it was the Pemberton Medicine Company, that is my best recollection. They had stationery or letter-heads. [1068] I do not remember that it was on there. The names of some of the medicines and so on, and et cetera—it had et cetera on the end of it. They had several medicines and et cetera, they did not have all of them, they had quite a number. Which ones I do not remember. They adopted that name of Koke, my father in law told me so.

Mr. HIRSCH.—I object to that part of the evidence which refers to the adoption of the name of Koke on the ground that it is hearsay testimony and move that it all be stricken out.

Objection overruled and appeal prayed and granted.

This Koke was printed, I think, in black, on the kegs. It was in jugs, too. They had a label on the jugs, a paper label, about the size of your hand, two inches wide, something like that. I first saw the change from Coca-Cola to Koke during the summer sometime or spring-time. I cannot recall the exact time, but after they had been in business for some

(Deposition of Thomas C. Banks.)

time. My father in law told me about this trouble with Dr. Pemberton.

Mr. HIRSCH.—I move to strike that part out on the ground that it is hearsay, the part of the evidence where his father in law told him about the trouble with Dr. Pemberton.

Objection overruled and appeal prayed and granted.

My father in law told me about the adoption of this new and novel trade name.

Mr. HIRSCH.—I move to strike that out on the ground that it is hearsay testimony.

Objection overruled and appeal prayed and granted.

I would never have known it any other way. I saw them every day, nearly and they told me.

Mr. HIRSCH.—I move to strike that out.

Objection overruled and appeal prayed and granted.

Mr. Bloodworth and Mr. Murphy. I saw almost every day. I am talking about what my father in law and Mr. Murphy told me.

Mr. HIRSCH.—I move to strike all that out on the ground it is hearsay and incompetent evidence.

Objection overruled and appeal prayed and granted.

Mr. Bloodworth told me Mrs. Pemberton took one-third of the manufactured products and stored it in Mr. Candler's Drug Store.

Mr. HIRSCH.—I move to strike all evidence pertaining to that out on the ground that it is hearsay,

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and therefore incompetent evidence.

Objection overruled and appeal prayed and granted.

I know about the [1069] *about the* name of a drink they were getting out then called Yum-Yum. I saw that down there. I saw labels for that, I think. That was along about that time in the spring, leading up to the summer-time. I think the name Koke was on the Pemberton Company's stationery. They formed the partnership about the last of 1887, in the winter-time. Mr. Mayfield stayed in Atlanta quite awhile after Mr. Bloodworth sold out to him. I went to his place of business after my father in law sold out. He was manufacturing the same thing they were, making up the same proprietary medicines, he was, the drinks and so on. My father in law sold out about 1888. After that Mr. Mayfield stayed in Atlanta two or three years. He still continued the business in the place on Trinity Avenue, and the same products, wine of Coka and Koke, Indian Queen Hair Dye, lemon and orange elixir, and he had a medicine called Gingerene, Globe Flower Cough Syrup. I think he continued under the same name of Pemberton Medicine Company. I know nothing to the contrary. After Mr. Mayfield left Atlanta he went to Birmingham, I think. I saw very little of him then. I do not know whether he commenced manufacturing any other drinks or not, besides those I have mentioned. I do not know where he got these labels from and this stationery. They never stopped using this name Coca-Cola, that I know of, that is, any time, of

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the time my father in law was in business. They made Coca-Cola and Koke both at the same time, and they finally ceased making Coca-Cola, I think they did, ceased making Coca-Cola and called it all Koke, but they made Coca-Cola and Koke at the same time, during the same period; it was the same stuff so far as I know, in appearance and taste and everything, it was the same. I do not know when they stopped using the name Coca-Cola, but I think they did stop using the name Coca-Cola. I won't say whether they stopped while my father in law was in business or not. They continued all the time that he was in business. I do not know why they quit using the name, if they did quit. I do not know that they ever quit. They made [1070] Coca-Cola and Koke both. The Coca-Cola now made in Atlanta, that is what I refer to. I do not know of any place where they shipped this product Koke to. They sold it around promiscuously. They sold it to soda-fountains. I do not know who they sold it to, I cannot recall the names. It was shipped out of Atlanta; I do not know where they shipped it to, but I know they shipped it. My father in law never did any manufacturing at all after the dissolution of the partnership. He just quit the business; Mr. Mayfield took the whole business, brands and everything, and went on with them. I do not know much about the controversy that the Pemberton Medicine Company and my father in law had with some eastern concern about Wine of Coka. They had some controversy with some party about orange and lemon

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elixir, about the name, I think. I cannot say what the outcome of that controversy was. As I recall, there was some dispute about the name. It was during 1888, I think. I could not tell more about the stationery of the Pemberton Medicine Company. I do not remember much about it. It never had Coca-Cola on it, to the best of my recollection. Just some of the other names, several of those medicines and so on, and others were not, but there was an et cetera. To the best of my recollection it had Koke on it.

Redirect Examination.

Mr. HIRSCH.—I wish to enter a final objection to all the evidence that the witness said some one, or any of it that he said some one told him or any evidence that he designates the person that told him as being hearsay and incompetent evidence and move that it all be stricken; and further that the supposition concerning the adoption of the name and the mixing of the preparation is a conclusion of the witness and not testimony and move that it be stricken as not being competent evidence.

Objection overruled and appeal prayed and granted.

After this Pemberton Medicine Company began to use the name Koke down there, the first time you actually heard the name Koke, how did the name strike you, as a name you had heard of before? I had never heard the name before.

Mr. HIRSCH.—That is objected to as a conclusion [1071] and therefore incompetent and I move to strike the same.

(Deposition of Thomas C. Banks.)

Objection overruled and appeal prayed and granted.

Q. 209. Now, was that a fact, that the name was new and short and all that, did someone have to tell you that, or is that the way the name impressed you?

A. It impressed me as being the first time I ever heard it.

Mr. HIRSCH.—I object to the question as leading and move it be stricken out.

Objection overruled and appeal prayed and granted.

In this house with me besides Mr. Bloodworth was his daughter Marian Bloodworth part of the time, and Mrs. Shelverton a part of the time.

Recross-examination.

Candler's drug store was the store of Asa G. Candler. A third of the manufactured products which they agreed to give her were stored in there, one-third of whatever they had on hand. I was not in the soda-water business in any shape or form, and never have been interested in it, or manufacturing soft drinks. I have never even run a moonshine still.

Redirect Examination.

Mr. Murphy died six years ago, I think; I am poor on recalling dates, about six years ago.

Deposition of R. A. Thorn, for Defendants.

R. A. THORN, a witness on behalf of the defendants.

Direct Examination.

Age, forty-one; live in Meridian, Mississippi, engaged in drug business. I have a drug-store. I have a fountain in connection with that drug-store. I have had that drug-store in Meridian about eight years. I dispense all of the different drinks, lemon, orange, vanilla, Coca-Cola, Dope and Koke syrups. I get this Dope syrup and this Koke syrup from the Southern Koke Company, New Orleans. Other Cola drinks I have handled are Co-nut, Coca-Cola and Afri-Cola. Recently a Coca-Cola Company's representative called at my drug-store, something like a month or six weeks ago, I don't remember the exact date, Mr. Leigh called. Mr. Leigh was registered at my hotel, the Union Hotel, and had been a guest of the hotel several times before. I always give him an order for Coca-Cola, either for present or future delivery. On this occasion he came in the drug-store, I was standing behind the soda-fountain. He said let me see you a [1072] minute. He walked on back behind the prescription case. I followed him, and he thumped a Coca-Cola barrel and said you will need a barrel before I get back. I said probably so, I expect you had better put me down a barrel, to be on hand when I do, and he looked around and there was a barrel of Dope syrup standing near. He said, "What is that you have got," and I said, "Dope." He said, "What is that." I said, "It is

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a Cola drink." He said, "What sort of drink?" I said, "It is something like Coca-Cola." He said, "What are you doing with that damned rotten stuff in your place of business?" I said, "That is good stuff, and I will give you a drink of it; I think you will like it." He said no, he did not want it. And he said, "Any damned man that will handle that rotten stuff and let it come into his place of business would steal." I said, "Hold on, Mr. Leigh, you are going a little bit too far." I said, "Don't accuse me of that." Well, he repeated his words, and I said, "Now, I don't have to steal, I never have stolen, and I do not steal from anybody," and I said furthermore, that any man says I steal, tells a God damned lie." Well, he made a pass at me to strike me and struck me a glancing lick beside the face and I struck him just over the left eye there with this hand and broke that finger, dislocated this knuckle. Well, we fought around behind the prescription case there; I don't know how long, but in the scramble we went on out through the front of the store, each one striking the other and out on to the sidewalk. We were having a considerable tussle. A man jumped out of a buggy from the street and run in between us and separated us. I left off part of the conversation behind the prescription case. He said, "I will take my name off your hotel register and never come inside of the hotel again." That was before he accused me of stealing. I said, "That is your pleasure to do and your privilege, if you feel like you want to do that." The idea with me was to try to keep his

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friendship. He was a guest of my own hotel. He had been there, I think, that was his third trip, probably the fourth trip at the hotel. I had done my business and kept on friendly [1073] terms with him and I would not let myself get huffy with him until he had accused me of stealing in the conversation. Then I got mad and made a very rough remark as just stated, and he struck my face. He said he would take his name off the register because I handled Dope syrup.

Cross-examination.

This Dope and Koke syrup is not two syrups, it is one, according to my understanding. I have been handling it, I suppose, six or seven months. The first I heard of it was the representative of the Southern Koke Company of New Orleans, who brought a sample there and sold me a half barrel. That was six or seven months ago. That was when I first heard of it. When that representative of the Southern Koke Company came to me he said I have a Cola syrup, I want to get you to try it. He had a bottle of it, and we went from the hotel lobby up to the store and made a couple of glasses of the drink and he drank one and I drank the other. There was quite a conversation before I agreed to buy. We talked about the syrup and several customers standing around drank the syrup and they all seemed to like it, and I thought it was very good. I think there was some remark made about it being on the same order as Coca-Cola. This syrup is billed one dollar and a quarter a gallon, with twenty-five cents

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taken off, if paid within thirty days, a dollar a gallon. I think in some stipulated time they would issue me stock for the amount of syrup bought. I thought so little of that, that I did not charge my memory with it. That stock would be issued to me, that was the idea. I bought it on the merits of the syrup more than on the promise of the stock. I got it cheaper than Coca-Cola. I handled Konut about a year. I handled some Konut syrup up to the time I bought the first Dope syrup. I handled Gay-Ola before I handled the Konut syrup, and some of it along the same time. There was a while I handled Konut and Gay-Ola at the same time. I handled this Gay-Ola probably a year. Afri-Cola is an extract drink. I put simple syrup with that to sell it. That was the first I handled. I have been dispensing Coca-Cola ever since [1074] it was brought into the State, I think, about 24 years ago. I am handling Coca-Cola now. When I was handling Coca-Cola and before I handled this Konut, Gay-Ola or Afri-Cola, when a man came into my place of business and asked for a Dope or a Koke we gave Coca-Cola. I thought he meant Coca-Cola, because that was the only thing that was handled at that time, as Dope. It goes back twelve or fifteen years ago. That gentleman's name was spelled Mr. Leigh—L-e-i-g-h, to the best of my memory. I know it was a Coca-Cola representative, because I am not sure he took the order, but I was in the act of giving him an order for a barrel of Coca-Cola when the conversation started. He had been around before. That was not his first trip, he had

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been there three or four times. This was a young, slender man, did not appear to be over 25 or 26 years of age; other Coca-Cola representatives are older and larger men. He had been at Meridian three or four times before that. In keeping these syrups, Coca-Cola, Dope and Koke, I keep them in separate containers. When a man comes in now and asks for a Dope or a Koke I give him out of the Dope or Koke container, the product of the Southern Koke Company, Limited, and every time a man comes in and asks for a Coca-Cola, I give it to him out of another container. I am behind the fountain myself, but very little. I try to make it my business to see always, when I am in there, and they understand the thing, I have instructed them and they always told me that they carried out the instructions. I told them when Dope was called for to serve the Dope syrup, and when Coca-Cola was called for to serve the Coca-Cola syrup. The Dope or Koke syrup is one syrup. If my instructions are carried out when a man comes in and asks for Coca-Cola and another man asks for Dope and another asks for Koke, there is no chance on earth of their getting them out of the same container, unless they willfully violate the instructions, and there is no probability of making a mistake, because they are kept on separate sides of the soda-fountain. I know where they are kept. The center one we will call "A," the first one to my left we will call "B," and the first one to my right we will call "C." I am the dispenser. "A" is hydrant water. "B" is carbonated water. "C" is

(Deposition of R. A. Thorn.)

carbonated water. The first plunger [1075] to your left, we will mark "D." I keep Coca-Cola in there. "E" Orange syrup, I think; "F" Chocolate; "G" Lemon. The first plunger to the right "H," Dope; "I" simple syrup; "J" vanilla, I think; "K" I have forgotten, some fruit syrup, though. I keep Coca-Cola in my first plunger to my left, and the Southern Koke Company product in the first plunger to my right. (The witness places the date and his signature upon the drawing.) This plunger "D" is marked Coca-Cola. "H" is marked Coffee.

Redirect Examination.

When customers come in and ask for Dope, I do not consider that they are making a definite and specific request on me to serve them with Coca-Cola exclusively. When I was handling Coca-Cola exclusively and they asked for Dope, I served them Coca-Cola, because that was the only Cola syrup I handled at the time. If I had had any other Cola syrup at that time and they asked for a Dope, I would have served them the first Cola syrup that was in reach of me, I guess, the one most convenient.

Recross-examination.

What I have just said applies to Koke just as well as it does to Dope. At that time it was the only Cola syrup known and the only cola syrup supposed to contain any drug or Dope, and I therefore thought they were specific requests for Coca-Cola.

Redirect Examination.

That was before I heard of these others, before

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any other Cola syrup was on the market around here, so far as I know.

Recross-examination.

I paid for Konut one dollar and a quarter a gallon, I think. I think it was billed at one dollar and a half and twenty-five cents rebate on it. I have forgotten what I paid for Gay-Ola. It was cheaper than Coca-Cola. Afri-Cola was a concentrated syrup that we mixed with simple syrup. Introduce sketch drawn by Dr. Thorn as Exhibit #17, to the testimony of Dr. Thorn, Complainant's Exhibit #17.

Deposition of H. F. Crisler, for Defendants.

H. F. CRISLER.

Direct Examination.

Age thirty-two. Live Jackson, Mississippi. Lived here twenty-four years. Engaged in drug business for three years. Corner Drug Store is the name of [1076] of my store. I have a soda-fountain in my drug-store. I have had it all the time I have been in business. I handle Coca-Cola and Dope. I get this Dope from New Orleans, the Southern Koke Company. I handled Konut. Customers come in and ask for a Coca-Cola if they want the genuine Coca-Cola, if they want some other Cola drink they ask for a Koke or Dope. I know I am giving them what they want, because that satisfied them, and if I serve them Coca-Cola it does not satisfy them. I have had customers come in and ask for a Dope and I served them with Coca-Cola and they would say it did not satisfy them, or reject it. It

(Deposition of H. F. Crisler.)

has occurred quite often, when we would be out of the Dope syrup and have to use Coca-Cola, quite often we would have complaints on the syrups, on the drink they were getting, almost invariably from the regular customers. I have heard the word Dope used quite a long while, almost ever since I have known Coca-Cola, for that matter. I have only had direct knowledge of there being other Cola drinks in the last three years, since I have been in the drink business, of course, prior to that time I bought Kokes and Dopes personally, but for ten or twelve years anyway. Before I went into business and went into the soda-fountain business and asked for a Dope or Koke I expected to get some Cola drink, other than Coca-Cola. When I wanted Coca-Cola I asked for Coca-Cola. A Coca-Cola representative came into my place of business recently, it was probably three months ago, I judge, that he was in there. It was in December when he was in our store. I do not think he is in this room now. I think he was black-headed, or dark hair. He was slightly slim, fairly full-faced, is my recollection. He was there when I went in, I believe I had been out to lunch. When I got there he was talking to the soda-men, soda dispensers. I do not remember his conversation with the soda-men, only they were very much disturbed when I came in, they told me, one followed me on back when I went to hang up my coat and said a Coca-Cola man had been in and [1077] threatened to prosecute them because they were serving a substitute for Coca-Cola and had

(Deposition of H. F. Crisler.)

them badly excited and disturbed. I cannot give the Coca-Cola representative's exact words because I did not make a note of it or anything that way. His attitude though was you might say, threatening towards me, in fact, he said if we served some substitute for Coca-Cola and continued to disappoint their customers when they called for a drink, that they would sooner or later put us out of business. He said that we did not have a right to sell anything but Coca-Cola. That they had the advertised drink and it was what everybody wanted no matter whether they came in and asked for a Koke or a Dope, that they really wanted Coca-Cola. I contended that when people asked for a Dope or a Koke I had as much right to serve them Dope as Coco-Cola, or even more right because there was a drink named Dope and we were serving that and they were satisfied and that was what they really wanted He said he was going to put the Dope people out of business, that they were selling a substitute for Coca-Cola and it was not legitimate—I do not know, his attitude was finally that the Southern Koke Company was doing a fraudulent business and we were too by handling their product. He said positively there was no trademark on the word Dope, that they were using it without any authority, that the government had never granted a trademark on the word Dope. He said the Koke Company's statements in their letter-heads that they did have them registered was not any truth in them at all, and about that time he and I both were inclined to

(Deposition of H. F. Crisler.)

be losing our temper and getting to talk pretty loud. Several customers came up to the fountain and I decided if we did not wind up, it seemed like we were going to have something more than words. I told him it was time for him to go and I did not want to have any more conversation with him. I escorted him to the door and told him he would have to go ahead. I did not want to fool with him, that we had Coca-Cola, and if I wanted it we did not have to buy from him, we could get it from whom we pleased [1078] and where we pleased. He had a contract and wrote up an order for a barrel of Coca-Cola. I did not read either one. I was not interested. I did not want the contract and did not want the barrel. I glanced over the contract. I did not read it carefully. He stated among other things that it was so we could get our discount and we would agree to handle nothing but Coca-Cola. He wanted me to sign a contract to handling nothing but Coca-Cola, that was my understanding of the conversation. I did not read the contract, I only glanced over it. He charged me with substituting. I do not consider that we had been substituting. When a man comes in and asks for a Dope or Koke we give him that and he was satisfied. I consider I was giving what he wanted. I never had anybody reject either this Koke or Dope when he asked for it on the ground that it was not what he wanted. I handle Coca-Cola and Dope both. These syrups came in a red barrel, except Coca-Cola. We have been buying from the drug-store, we bought in a five-

(Deposition of H. F. Crisler.)

gallon demijohn. The Coca-Cola barrels have labels on them and the Dope barrels have Dope stenciled on them. The only three syrups I ever handled were Konut, Dope and Coca-Cola. They all came in red barrels. This Dope Company is the Southern Koke Company, Limited, of New Orleans.

Cross-examination.

Substituting is offering a man something different from what he calls for when he knows what he wants when he calls for it. We have served him Dope and he is satisfied with that and when we have been out of Dope and had to use Coca-Cola exclusively, why he was not satisfied with it. We have had numbers and numbers of them say they did not care for the drink Coca-Cola, it was not satisfactory, or walk off, of course ordinarily a man would not say anything. He would say this is not what you have been serving me, and usually he did not say anything, just walked off and left the full glass, of course I would know he was not satisfied. When a man came in and paid a nickel for a drink and go off and leave it, you know he is not satisfied. If a man gets what he wants and is satisfied and comes back time and time again [1079] and asks for the same thing, and gets the same thing, and is well satisfied, it is pretty good evidence that is what he wanted. He keeps on asking for Dope and he seems satisfied—that would be the best way I could determine whether a man is satisfied or not, that he would continue to come back, and ask for the same thing and repeat the operation over and over again. I could not say how

(Deposition of H. F. Crisler.)

the word Dope came about, only from my own personal experience and how I have used it. I never used it in applying to Coca-Cola. When I wanted Coca-Cola I asked for Coca-Cola. I first commenced drinking these drinks I think almost ever since I have drank Coca-Cola, that has been probably ten or twelve years ago. I knew certain places I visited handled a drink different from Coca-Cola, a Cola drink different from Coca-Cola and I bought it and asked for Dope and I got what I wanted, and if I asked for Coca-Cola they usually gave me Coca-Cola. I do not remember the names of those drinks. This corner right here, you could ask for Dope and get a drink, it did not taste like Coca-Cola to me and was not Coca-Cola so far as I knew then. I have no idea the name of the drink, the only thing I know is that it was not Coca-Cola. I knew of Coca-Cola as a specific product like lemon phosphate and orange, but if I asked for Dope I got exactly what I wanted. I do not suppose I have served one hundred drinks in my life, the boys have instructions to serve Coca-Cola and keep Coca-Cola in one position and the other syrup in a different one, whatever we serve, in the other container, and if they ask for Coca-Cola, to give it to them and if they ask for Dope to give it to them. Vanilla and lemon are so entirely different there is no connection between them, but there is a connection between these two drinks, Dope and Coca-Cola, they have the same general appearance and taste. I am sure the average customer could tell the difference in the

(Deposition of H. F. Crisler.)

taste, I know they do tell the difference at our fountain. I know on one or two occasions we have been out of Dope and when we had to serve them Coca-Cola they were not satisfied with it and that is the only criterion, you might say, we have to go [1080] by. I have served Coca-Cola and no other one of these drinks and dissatisfaction arose then. Plenty of people come in and want Coca-Cola and do not want anything else. I do not know that they knew about the other syrups that I had, only they had been coming in and drinking Dope and when they got Coca-Cola they were not satisfied with it. I always give the other fellow the same allowance, or argument, when I want Coca-Cola I ask for it and when I want Dope I ask for it. I think nine-tenths of the customers know I handle the different products from Coca-Cola, because when we had to serve Coca-Cola none of them were satisfied. They come there to my place and we had every reason to believe that the other places were not serving anything but Coca-Cola and they said that ours was better and what they wanted. If anyone comes in and asks for a Dope and got what he wanted and was satisfied, that convinces me that he knows that he is getting something different from Coca-Cola. I cannot read another man's mind, and I cannot tell you except from his action as to what he believes he gets there. He might possibly think it was Coca-Cola that he was drinking with a relish, instead of Dope. Of course, those things are possible, this man might follow out your same course of reason-

(Deposition of H. F. Crisler.)

ing, and go into two or three other places and ask for Coca-Cola and get a drink that tasted like Coca-Cola and he had every reason to believe it was Coca-Cola and then come back to our place and ask for Dope; that automatically shows that he knew he was getting some drink different from Coca-Cola and that satisfied him. Carbonation makes some difference in the taste of the drink. He might have thought our product was being handled better, that we took care of our customers better; he might have arrived at that conclusion, that is possible, but not at all probable. My line of reasoning, if a man comes in day after day and asks for Dope and gets a drink that satisfies him and comes back and repeats the operation over, maybe three or four times a day, and he knows he is getting what he wants and is pleased with Dope, he [1081] knows the specific product he is getting. He asks for Dope and he gets it. We have handled Dope and Konut ever since we went into business. 'The product of the Southern Koke Company we have handled about a year, I guess. Prior to that time, we carried the Konut syrup. I do not think I have ever been without Coca-Cola. Before we carried this product of the Southern Koke Company, and a man comes into our store and asked for a Dope, we gave him Konut. There is very little difference between the taste of Konut and Dope. Mr. Young, the salesman from the Southern Koke Company, had been traveling for the Konut people and he got me to use the Dope, in fact up to that time I did not know there was a

(Deposition of H. F. Crisler.)

product copyrighted as Dope. He just had been traveling for the Konut people prior to that time and we had always been giving him the orders regularly, and about two or three every month, and he said he could fill our orders now from the Southern Koke people and that he would guarantee the syrup to be as satisfactory. He told me that that name Dope was copyrighted. He did not tell me I could not sell Konut when Dope was called for, at that time. He discussed that after a while, not at that time, that the customers were entitled to get the copyrighted product when they called for Dope. I had heard long before I heard of this product of the Southern Koke Company, of the term Dope. I judge it applies to this product of the Southern Koke Company exclusively, in a legal sense but prior to the time I had heard of it, I just considered it was a drink that was different from Coca-Cola. I have heard of Dope almost ever since I heard of Coca-Cola. There were other drinks of the same kind at the time I heard of Coca-Cola, similar to Coca-Cola. I do not remember the names of those at all. I did not have occasion to do the buying for any concern serving any of these drinks. Coca-Cola is well advertised around here. I have no advertising in my store at all. I may have had advertising of it at some time, a good while ago. I do not remember that I ever had anything except some—perhaps some little thing the advertising man dropped in and left in the summer. I never sent to the house for any advertising matter. I never had painted or

[(Deposition of H. F. Crisler.)]

printed signs [1082] around, or globes, anything like that. I think we had some fans and maybe, you know a traveling man would drop in and leave those things at the fountain, quite often you know, but I did not pay any attention. I know there was some trays and some fans. I do not remember of anything else, there might have been something else because I did not serve the drinks at the fountain, I did not have occasion to come in contact with them. I am at the cash stand quite a good deal, directly across from the soda-fountain and watch the trade pretty close. If a man comes into our place of business and asks for a Coca-Cola, another man comes in and asks for a Dope and a third man comes in and asks for a Koke, the soda-man is supposed to give the men just what they call for, and that is customary in the store. If he knew the man asking for Coca-Cola wanted Dope, that he had been trading at the store before and knew that he wanted Dope, he would draw them out of the same container. He will know from past experience that he wanted Dope, and we give Dope and he is satisfied. I do not think that is substitution. It may be legally substitution. The reason it is not substitution is that because before I have served them with Dope syrup and he has liked it and I do not think that is substitution and he apparently liked it and does not kick. Coca-Cola is supposed to be made in Atlanta, Georgia. I mean the one that is advertised, ask for Genuine Coca-Cola if you want it. "Ask for the genuine if you want it, nicknames

(Deposition of H. F. Crisler.)

encourage substitution.” I have seen that advertisement. It naturally wants you to demand Coca-Cola irrespective of what you might want. I suppose they are referring to any Cola product. I judge that they have reference to Dope and Koke. I have heard of this product that is named Koke almost since I have Coca-Cola, Koke and Dope, don’t know definitely. I was connected with the Jackson Loan & Trades Company. It was a building and loan association. We had trouble with the Federal Authorities, and were put out of business, for the mis-use of mails and the business was wound up. They took action against me personally. The [1083] Government’s contention was found to be right. I was sentenced.

Redirect Examination.

I was secretary and treasurer of the Jackson Loan & Trust Company. It was a building and loan association and we had an agent that operated in Oklahoma and he did a good many things that were irregular and he was indicted by the grand jury in Oklahoma and we, as officers of the company, were naturally responsible for his actions; or rather we were termed to be responsible for his actions by the Government, indicted jointly with him and had to stand prosecution for his offenses as well as he did. I did not know anything about the irregular conduct that he was doing until probably six months after it was done, the Government did not take it that we were relieved because of our relations and

(Deposition of H. F. Crisler.)

not keeping up close with him. He was the agent of the company and I was secretary of the company and the Government held that it was my duty to look after it.

Recross-examination.

The crime charged in the indictment was fraudulent use of the mails. I stood trial. The agent, I and the president of the company were all sentenced to fines and imprisonment in the county jail here. I paid the fine and served the sentence in Guthrie, Oklahoma. Dope was stenciled on the barrels we got from the Southern Koke Company. I do not remember a label there. I think it had the name of the company *is* one form. I do not remember whether it had Koke on it. I never paid any attention. I do not think so. It just had one word stenciled and from the Southern Koke Company, New Orleans. The only ones I have gotten always had the labels pasted on it and Koke had it stenciled with black ink, black paint on the barrel.

Deposition of H. M. Todd, for Defendants.

H. M. TODD, a witness on behalf of the defendants.

Direct Examination.

Age twenty-seven. Live 223 E. Capital Street, Jackson, Mississippi. Lived here all my life. Engaged in drug-business. Name of my drug-store, Todd's Drug Store, 204 West Capitol St. Owned that store since the fourth of March, 1913. I am about the fountain myself frequently so that I can

(Deposition of H. M. Todd.)

hear the names customers use in asking [1084] for drinks they want. I have a soda-fountain in our drug-store. We dispense just one Cola drink, Konut, out at Atlanta. The fellow I bought out used it and I continued using it. Mr. Clark who was traveling for them quit the Konut people and started in business for himself and went to manufacturing a Dope of his own, Miss-Ola, I believe. I used one barrel of it which did not give us satisfaction and we quit, and we started using a preparation put out by the Southern Koke Company, called Koke. Our customers in asking for these Cola drinks ask for Dope and Koke. I give them Dope, all we have got. I mean by Dope this New Orleans product, of the Southern Koke Company. Before I began to handle that when they asked for Dope or Koke I gave them Konut. When our customers asked for Dope or Koke and I served them either Dope or Koke made by the Southern Koke Company of New Orleans, in a way I considered I was giving them what they asked for, something on the same order as Dope. We never had any customers turn it down and reject it when served to them in response to call for Dope or Koke on the ground that it was not what they asked for. We have had them to send back Coca-Cola and ask for Dope. At times we have run out of Dope and sent out and bought Coca-Cola from somebody in town. When we have not got Coca-Cola in our house and the customers come in and ask for Coca-Cola we tell them we have not got Coca-Cola. I had a call on

(Deposition of H. M. Todd.)

me from a representative of the Coca-Cola Company within the last four months, I think it is. He came into the store, I was out at the time. I knew he was in town. He went up to my brother and asked for Coca-Cola and he told him he did not have Coca-Cola. He said, I can give you a Dope. So he never said anything and he told him, I think my brother went on and served it anyway and he took a drink of it and said this is not Coca-Cola. My brother said, "I told you it is not Coca-Cola, we don't handle Coca-Cola." He went back in the back of the store and there was a barrel of Coca-Cola back there at the time, I expect there was about ten gallons in it. He told him then that we did not serve Coca-Cola. He went back and [1085] and looked at the barrel and saw what it was, that there was a Southern Koke Company's barrel and he said you had better give me an order for a barrel. I said we will sell out what we have. He came to the front telling me about people around the country that they were going to fight. I told him they will not get after me because I don't handle it. I guess he meant the Coca-Cola people were getting after those parties who handled Dope and Koke. He said he could give us some trouble if he wanted. I told him all right to go ahead and give me all the trouble he wanted. I have not bought but one barrel of Coca-Cola from the Coca-Cola people in two years. I know that he was a Coca-Cola representative because he took an order for a barrel of Coca-Cola on a Coca-Cola order blank and he had been distributing advertising mat-

(Deposition of H. M. Todd.)

ter for Coca-Cola at the time. He told me then if they come in and asked for Coca-Cola—I told him that we told them that we did not have Coca-Cola, but we had Dope. He wanted to know if I did not want to handle Coca-Cola. I told him no. I guess we sold last summer right here on the corner two barrels of Konut in one month, and they handled it and there was a soda-dispenser there that witnessed everything. He stated to me, but he is not here. He is working at Greenwood, Mississippi, you can get good dope out of him if you can get him. His name is John Gayden, he works for some fellow in Greenwood, I cannot think of his name, although it begins with a “W,” a drug-store.

Cross-examination.

Up to a couple of days ago I have not had any Coca-Cola in our place for over a year. If a man came in there on February 23d I told him I did not have Coca-Cola. Mr. Ford, right here on the corner, run under the name of Brown at that time he was out of Coca-Cola and sent out and asked if I had Coca-Cola. I told him no, I said I have got Konut. He said all right, let me have that. I sold him about two barrels. I never handled Coca-Cola regularly since I have been in business, except as I sent out and bought it. Before I went in this drug business I was night [1086] clerk on the corner down here, the drug-store. I was night clerk on the corner a year. I have been in the drug business all my life. I have had places where they handled Coca-Cola regularly. Every place I have been to they handled

(Deposition of H. M. Todd.)

something else like Coca-Cola. "B" is plain water, "A" and "C" are carbonated water, right in the center of the fountain. "D" the first on the left is vanilla. "E" pineapple; "F" orange; "G" lemon; "H" strawberry; "I," I do not think there is anything there. On your right "J" Dope; "K," I believe is chocolate; "L" plain syrup; "M," nothing; "N," nothing; "O" broken, then there is nothing in "M," "N" or "O." That is the arrangement I have had ever since I have been out there. When I have Coca-Cola I put it in the same tank I have Dope, in "J." I do not think there is any label on it. There may be some label on it, I do not know, I didn't notice it. I have heard of these terms Dope and Koke about six or seven years. They apply to Coca-Cola to some extent. They impressed the customers who generally come in and called for Coca-Cola, so much, just like anything else, a nickname, Koke and Dope. I first heard these terms Koke and Dope just after Coca-Cola came out and when people come in and asked for Koke or Dope, as nicknames for Coca-Cola. Offer diagram in evidence as Complainant's Exhibit #18.

Deposition of Robert E. Ousley, for Defendants.

ROBERT E. OUSLEY.

Direct Examination.

Age thirty-five. Live Kosciusko, Mississippi; lived there five years; engaged in retail drug business I have a soda-fountain in my drug-store. I have had that drug-store since November, 1910, that

(Deposition of Robert E. Ousley.)

is half interest in it. During the absence of the men—I mean the soda dispensers, I am about the fountain and hear the name customers use in asking for drinks. We are dispensing Coca-Cola and we have one called Koke and Dope. Koke and Dope is shipped from New Orleans from the Southern Koke Company, Limited. I have dispensed Konut syrup, it is a cola drink. During this year the Coca-Cola man left us a sufficient supply of advertising in the last few months, but prior to that time he [1087] would not leave us anything at all, he did not give us any trays, pencils or anything. He claimed we were handling Konut syrup, and said we were not entitled to them when we were selling Coca-Cola all the time on calls for Coca-Cola. He claimed there was only one place in town that sold pure Coca-Cola. He wrote all over the windows and sidewalks that we did not handle Coca-Cola and he would not give us any advertising matter because we would not sell pure Coca-Cola, it was their regular advertising agent. Another representative of the Coca-Cola Company came in later, I think he said Pierce, if I remember right. I think that gentleman over there was the one that called at my prescription department. (Pointing to Mr. H. B. Pierce.) It was as an attorney of the Coca-Cola Company. He told me he had jumped all the way from Oklahoma down especially to see us, that we were charged with—that is we were using Konut syrup at our fountain as a substitute for Coca-Cola. I never did deny the charge of using Konut syrup at the fountain, but

(Deposition of Robert E. Ousley.)

as substituting for Coca-Cola we always have Coca-Cola in the house and my instructions to the dispensers for both preparations we have at the fountain to give Coca-Cola when Coca-Cola is called for, and when they say Koke or Dope, I instruct them to give a cola drink, and he told me he had traced a shipment of Konut syrup up from Atlanta, from the time it was shipped there until it reached our depot and had pictures of my loading it on the wagon and where it reached my place of business where it was unloaded at. I did not deny that party, and I do not deny it now. He presented me with a contract or agreement, whichever you might call it. It was typewritten, if I remember right. It provided that we would discontinue handling Konut syrup or anything, that we would have Coca-Cola to serve on every call for Coca-Cola, which I discontinued from the time he was there of selling Konut syrup. He seemed, the way he looked at it, he seemed to think that all of the business for Cola drinks belonged to the Coca-Cola Company, for Cola drinks. I signed the agreement after he told me that if I did not voluntarily do it, that [1088] if I did not do it he would turn it into a local attorney's hands and force me to do it before he left town, and if I did do it, that would be the end of it, and he would drop it from that time on. That was not voluntarily on my part, but I signed to keep from being embarrassed by a local attorney. At the time this Coca-Cola advertising man came through there was writing all over town that I did not handle Coca-

(Deposition of Robert E. Ousley.)

Cola and all that sort of business, we had Coca-Cola in the house and I told him so, rather the man we have told him. I do not think he was treating us right to put that up until he had found it to be a fact that we did not have Coca-Cola, because we had it, because we were handling Coca-Cola and it is an injustice to a man's business to advertise that there is only one place handling it.

Cross-examination.

I could not tell the name of the advertising man. He advertised in great, big white letters all over the window that that was the only place in town that handled Coca-Cola and all over the sidewalk, and would not give me a tray or any advertisements, for he wanted to fool the people, and he even came down and told us, he said, "I am not going to give you any advertising, you are not selling pure Coca-Cola." I told him that we were selling Coca-Cola when they called for it by the name. His idea was that I was not selling pure Coca-Cola, that was what he was inferring about it, probably he wanted to leave that impression. I never to my knowledge substituted anything else for Coca-Cola, that was not Coca-Cola when Coca-Cola was called for. I am not about the fountain except when my dispenser is out at dinner. I have not a copy of the agreement signed for Mr. Pierce. "Messrs. Ousley & Berman, Kosciusko, Mississippi. Gentlemen: You will please enclosed find statement as given to our Mr. H. B. Pierce by your firm on February 11th, 1914, as per your request this statement together with Mr. Pierce's re-

(Deposition of Robert E. Ousley.)

port has been referred to our clients, the Coca-Cola Company, who we believe will be satisfied by the agreement on your part not to handle any imitation or substitute beverage for Coca-Cola. Yours truly, Thompson, Chandler & Hirsch, General Counsel for the Coca-Cola Company.” I could not say for sure whether I got that letter. Mr. [1089] Mr. Bearman, my partner, is not in town. Mr. Bearman opens most of the mail and I think Mr. Bearman signed the contract. I think I signed it also. I do not know whether it was written out in long-hand or typewritten, I would not know the contract. That was behind the prescription counter, after it was signed. I said it was a contract, agreement or statement. I did not intend it as a confession. We read over the agreement, statement, whatever it was, but I understood it as fountain drinks, for Cola drinks. Mr. Pierce there asked me in this line, “When a man walks up to our fountain and asks for Dope or Koke would not you naturally infer that he meant Coca-Cola?” I told him that I would have no right, I could not read his mind and I had no right to do it. I don’t believe I read the statement over at all. I am pretty sure I did read it. I never did admit that Koke and Dope were nicknames for Coca-Cola to Mr. Pierce. At the time I was kinder excited, I could not remember every word that was in it, it was a great big statement. Mr. Pierce came in, it was late one afternoon and I think maybe he stayed there thirty-five or forty minutes, something like that if I remember right. He came back after din-

(Deposition of Robert E. Ousley.)

ner, and he was there a good little while. If I make a confession, I did it unknowingly, I did not know, because I read Mr. Pierce this statement I told him about my instructions to my dispensers to always sell Coca-Cola when Coca-Cola was called for. I kept both in the house at the time. I had the Konut syrup in the house and the Coca-Cola. So far as I know Konut has never been substituted for Coca-Cola. Because we did not buy Coca-Cola was not any sign we did not have it in the house. I think we had Coca-Cola all the time. I know we had Coca-Cola. Now, I will tell you what Mr. Pierce did tell me; we sent a detective to your place early one morning for Coca-Cola and the boy went back and drew a bottle of syrup out of a Konut barrel, the dispenser boy or negro porter that the dispenser told to go and get Coca-Cola and he claimed he had a picture of the negro that went back and got it out of a barrel containing [1090] Konut syrup. That is what Mr. Pierce claimed. I do not know what was gotten. How many samples were taken at our place, I do not know. I have no knowledge of it. Mr. Pierce claimed one sample was carried out in a four-ounce bottle. He did not explain to me that more were taken, only one. He showed me a whole bunch, that is why I say I cannot remember what he did say. His first trip down to see me, I was out. I do not know what Mr. Bearman did. I looked for the agreement a time or two, but I could not locate it, after the fire. I have no copy of it. He told me I did not have to sign it unless I wanted to, but if I

(Deposition of Robert E. Ousley.)

did not he would get a local lawyer and force us to sign. He said he had traced a shipment to our house, that he was satisfied that we used it as a substitute for Coca-Cola. He was going to force us to sign it because he had proof that we had substituted—that is what he claimed, that he had traced it and had proof and he would force us to. His idea was that he was going to force me to stop selling Konut when Coca-Cola was called for, but I signed an agreement to stop selling Konut. I signed an agreement that I would not substitute Konut for Coca-Cola, that I was to discontinue handling Konut syrup and sell pure Coca-Cola and I signed an agreement to do that. That was what Mr. Pierce was after. So far as my knowledge goes, I have never done any such thing at my place, no substitution of other products when Coca-Cola is called for. I could not say what my boys have done. This drink Konut is rather similar to Coca-Cola. You could not hardly tell the difference between them by looking at or tasting them. I pay less for Konut than for Coca-Cola. It is a Cola drink. I took up the Koke and Dope about a month after Mr. Pierce was there, it was a little over a year ago. A traveling man came around and told me that Koke and Dope were copyrighted by the United States Government and we had as much right to sell it as Coca-Cola, when a man come in and said “Give me a Koke or a Dope,” it was copyrighted. He said those two names are both copyrighted. He said “Koke and Dope are copyrighted drinks, [1091] just the same as Coca-Cola is a copyrighted drink.” He said, “If you do not give him Koke or Dope you are infringing on our name as much

(Deposition of Robert E. Ousley.)

as Coca-Cola or anyone else for that.” I bought it because I could know what they were calling for, Koke and Dope. It costs a little less than Coca-Cola. There is more profit over the counters. We put this in and when a man comes in and calls for a Koke or a Dope we give it to him and when a man calls for Coca-Cola we have Coca-Cola for him which we always have. He just said, “This is a Cola drink, he said a Cola drink.” I do not remember him saying it tasted like Coca-Cola. He made the drinks and showed them to me. “He had a sample, and he said, ‘Here are two drinks.’ Q. 122. Oh, two drinks. What about the other one? Did he ask you to draw a Coca-Cola from your fountain? A. He did not draw a Coca-Cola. He said, ‘You know what Coca-Cola is?’ ” He said, ‘Here is my cola drink.’ Q. What two drinks are you talking about? A. Koke and Dope. Q. Is that two drinks or the same thing? A. The same drink,—and he said, ‘There is your Coca-Cola.’ ” When people come in and ask for Koke or Dope we give them that one thing which comes to me, Koke or Dope. It comes from the Southern Koke Company of New Orleans. We keep our Coca-Cola in a different container from this other Southern Koke Company drink. I could not draw a picture of the fountain, because I do not dispense soda, we have a regular soda dispenses there and he keeps them. In fact, I do not think half the labels are on the pumps in the soda fountain, I could not do it. I do not think there is a label on either of them because the pumps are all worn and I noticed it is changed about frequently. The syrups in the fountain, sometimes I go to make a drink and maybe there will be some other syrup in where the Coca-

(Deposition of Robert E. Ousley.)

Cola was. I am not close to the fountain all the time, unless I have to go there. I would have thought that Koke or Dope had applied to any Cola drink. I do not know what it meant before I knew of these drinks, that has been so long ago. I expect most of us would naturally infer that they were nick-names for Coca-Cola, of course, I never gave it that kind of thought. That is a picture of the store, a picture of the front. Mr. Patton was the salesman that called on me and sold me Koke or Dope. I have not the date. Koke and Dope comes in a barrel. The barrel is painted [1092] red. I think it has no label on there.

Redirect Examination.

It is always billed in the bill of lading when it comes both as Dope and Koke, but I do not recall having seen the name on the barrel. When customers come into my place of business and ask for a Dope or a Koke I do not consider they are making a definite and specific demand on me for Coca-Cola exclusively. If they did, I would not give Koke or Dope, they say give me a Koke or Dope.

Recross-examination.

I do not pretend to know my customers' mind. I would naturally make very close inquiries on anything in the prescription department if he comes back and calls for something there. When a man comes into our soda-fountain and asks for a Dope or Koke, I give Dope or Koke. I think he wants a Cola drink just like I would be if I should walk down here and say give me a Cola or Dope, I would

(Deposition of Robert E. Ousley.)

be more than likely to say Cola than any other drink. That satisfies the thirst is all I care about, to satisfy the thirst.

Redirect Examination.

When I go in a soda-fountain and ask for a Dope or a Koke, it does not make any difference the brand, in fact any kind so long as it is satisfactory. Offer in evidence Exhibit #19 to the testimony of Mr. Ousley.

Deposition of Hugh Lee Boyd, for Defendants.

HUGH LEE BOYD, a witness on behalf of the defendants.

Direct Examination.

Age, thirty years old. Live in Kosciusko, Mississippi. Lived there about fourteen years. I am engaged in the drug business. I own an interest in it. I have had that drug-store about two years. Before that I worked in a drug-store. I have worked in a drug-store before that about 11 years I reckon, ten or eleven, I do not know exactly. I have known of Cola drinks about ten or twelve years. I am about the fountain frequently so that I can hear the names our customers use in calling for the drinks they want. I am dispensing the Southern Koke Company's Koke or Dope, and Coca-Cola. I have dispensed this Hagan & Dodd drink, Ko-Nut. Customers indicate to me that they want a Cola drink by asking for a Koke, Dope, give me a shot and things like that. When customers come in and ask for a [1093] Koke, Dope or a shot in the arm, or

(Deposition of Hugh Lee Boyd.)

shot, I do not understand or consider that they are making a definite and specific request on me for Coca-Cola and nothing else, because some of my customers know what I handle. I do not know how they know I am handling Dope. The ones I speak with reference to have seen Koke and Dope and I have told them that I had it. They said they liked it better and they continued to ask for it as Dope. The words Koke or Dope or shot in the arm, do not mean Coca-Cola exclusively. I think a representative of the Coca-Cola Company called in the past year. I do not remember the date now. That is the gentleman over there. (Pointing to Mr. H. B. Pierce.) He came in and told me that we were selling Konut. I told him I was, that it was right. I knew it. He said I had no right to do it, that they had traced it from Atlanta down here and I told him that was all right. He began to talk pretty rough about it and said he was going to put it in the hands of attorneys before he left town and wanted me to sign an agreement which he wrote back there in my office, that I would not handle nothing else but Coca-Cola. I would not sign the agreement. His attitude was pretty rough, in fact I would not have liked for ladies to have been around, it was at night though at the time. He did not talk any language that a lady could listen to, in fact if my wife had been there I would have asked him to get out, that was how rough he talked. His manner was overbearing. I did not sign the contract. I told him I would rather not sign it; he said when he got back he would send me a

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copy or blank form whichever it was, to sign, which he sent, but I did not send it back to him. I subsequently got a letter from him, from Atlanta, enclosing a contract to be signed by me. I show you a paper marked Defendants' Exhibit #31, purporting to be a letter from Thompson, Candler & Hirsch, dated February 17th, 1914, to Boyd & Jackson Drug Company, Kosciusko, Mississippi, showing on the left-hand margin, dictated by H. B. P. and J. I will ask you if that is the letter you got from him. That is the letter, yes, sir. I show you another paper marked Defendants' Exhibit #32, and ask you [1094] if that is the contract that he enclosed. Yes, sir, that is it. When you got this contract, what did you do with it? Why, I put it away in my safe.

Mr. LITTLETON.—I tender and offer in evidence on behalf of the defendants in the above-entitled causes Exhibits 31 and 32, which are the papers referred to, as evidence on behalf of the defendants.

Cross-examination.

I said I did not know any way to prove that they do know I handle Coca-Cola. I handle advertising of Coca-Cola sometimes, though I have not lately, but they would know it when I advertised it, and there was no reason to think that I would cease to handle it, not until that fellow wrought on our nerves. I do not know whether Mr. Pierce said anything about samples or not. I think he told me he had evidence that when Coca-Cola was asked for at

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my place of business that some other product was given. I was not excited so very much. I do not know that he told me, I could not swear that he did. Mr. Pierce come in and told me that I was knowingly selling this, that I was buying and selling this other stuff for Coca-Cola and that it had to be stopped. He said I ought not to have it in my fountain, that he would see I was going to get it out. I do not remember the entire thing, he talked, it was pretty rough language. Both of us said words we ought not to use; all I can say is it was language no lady should hear. He told me he was going to have to put the case in the hands of an attorney before he left town in a pretty rough manner and talked rough. His language was rough, cuss words. I do not think either one of us said anything too nice. I do not know what he came for. He said I could not substitute, I told him I was not substituting. He said I had Konut in my fountain. He said it ought not to be in my fountain at all. Dope and Koke, Cola and shot in the arm mean any Cola drink. I have been hearing it ever since I have been big enough to hear. I always had my mind made up that way, I think they were nicknames for any Cola. I think they could be nicknames for Coca-Cola as well as nicknames for Gay-Ola or Dope. I never thought they applied exclusively to Coca-Cola. I have been hearing of Koke and Dope ever since I have been big enough to drink it. I heard of [1095] this Southern Koke Company about two or three years ago. Afri-Cola I have always known of

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that as Koke. I could not say exactly how long I have known of Afri-Cola. I do not think these nicknames arose from Coca-Cola. I do not know where they came from. The public at large mean by Koke and Dope any Cola drink, because they come under that head. It is a nickname that can be called anything, anything called for a Cola drink, you can get a Cola drink. Just the names they have got, they come in and call for a shot, a nickname for Koke, Dope, any Cola drink. I just have the impression, that is all. People know I have Koke and Dope. I have one doctor who asks for it all the time, he is not the only one. I reckon there are fifteen or twenty in our town altogether. We have advertising in there; I have had some of it off and on for the last five or six months, advertising of the Southern Koke Company, Koke and Dope on it, I believe. It is on a green looking card, about that long in white letters. It has a little string in the middle. It is hanging up in my place right now. It has been up three months, I reckon, two months anyway for sure. I do not know where these terms Koke and Dope arose from. I heard of Koke and Dope all my life—so far as that is concerned, Koke and Dope have been used ever since I have been big enough to drink it. This Cherro-Cola is another Cola drink. I do not know whether Coca-Cola was the first I heard, I cannot say. I do not know how long they had been bottling that stuff. I do not know whether I knew of any more than Coca-Cola or not. I expect I have forgotten the others because I have drank it at these

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country stores. I got Coca-Cola first, but other than that I do not know. When I asked for Koke and Dope I expected to receive a cola drink. I might have expected to receive a Coca-Cola. I did not know the difference. Koke and Dope is just one drink, it comes in a barrel, a red barrel, but I do not know what is on it in the way of a label. It cost me a dollar. Coca-Cola costs me a dollar and a half, but I get a rebate, depending on how much I use. I bought this product from the Southern Koke Company from Mr. Patton. [1096] Think he told me about this Koke and Dope, that he was handling, and wanted to put in some. He said it sure was a good thing and he was selling a good deal of it. He had a sample and mixed a drink. I did not know which one I was drinking, Coca-Cola or it. He never said a word about it being like Coca-Cola. He told me I could not tell them apart, I think. A man come along and told me about Koke and Dope being copyrighted. He did not say anything to me that you could not sell anything but their stuff when people asked for Koke and Dope. He had a card; I do not remember what was on it. I know Mr. Ousley. I guess he has been on the stand here to-day. I never talked to him anything about this. I did not ask him nothing about this. He said something about something, I don't know what I come on in here. I started to and he talked to me and told me to go on.

Redirect Examination.

The Coca-Cola representative wrote a sign over this other store as well as I can remember, Mr.

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Croch's, at Kosiusko, saying that it was the only store at the time that sold Coca-Cola there. At the time that was written up there I had Coca-Cola. The others said they handled it too and I guess they did. I do not know why he put it up there, it looked like he wanted to hurt us, because I was handling some Southern Koke Company's goods.

Recross-examination.

At that time, when the sign was put up there, I was also either handling Konut or this other, Koke and Dope, it may be both. I commenced handling this product for the Southern Koke Company two years, or a year and a half ago. I do not remember about what time it was this man put up that sign.

Deposition of S. T. Mayfield, for Defendants.

S. T. MAYFIELD, a witness called on behalf of the defendants.

Direct Examination.

Age, thirty-two years. Full name, Stephen Taliaferro Mayfield, commonly known as Steve Mayfield. Reside, Birmingham, Alabama. When I first went to Birmingham I traveled out of there. I have resided there permanently since about 1903. I am city representative of the Fies Liquor Company. My father is J. C. Mayfield. I lived in Atlanta, Georgia; it must have been about 1888. We [1097] moved there about that time. I was a child, about five years old, and all I have is just, of course, a child's recollection of such little incidents that have occurred to me and now that I can place and know

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other facts, I judge it is just about that time. I remember living with Dr. Pemberton and his wife and son. I remember one instance connected with that, the shape of the house, its location toward the street and I also remember that I was very much horrified at Charley Pemberton, Dr. Pemberton's son, he blew his nose on a towel one time. That far back I have not any recollection of what my father was engaged in; I can remember something about him being engaged in the lumber business in Florida, and coming up after 1888, about, I don't know just what time, I can remember he was a supply merchant in Roanoke, Alabama. My father manufactured and sold a product by the name of Koke. It must have been about 1892, in Atlanta. At that time I was about nine years old and I was in school in Atlanta and on Saturdays I would go down to the place where they were engaged in the manufacture, and I remember on one occasion I got a lot of red paint on my clothes; I was fooling around the kegs and used to get sugar down there and take it home and make candy. He was manufacturing Koke at that time. I remember he had a lot of boxes filled with bottles and products and a lot of labels; I used to play around there. I drank some of this Koke; it was a fountain drink, a syrup. It was a dark brown; I used to dilute it with hydrant water and drink it. That place of business was on Trinity Avenue, I believe, that is my recollection, near Pryor Street. I was in school, and, of course, come down to the place of business on Saturdays, and occasionally during

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the week time. Mr. Bloodworth was in the business with my father. My father and Mr. Bloodworth stayed together as I can remember, until about 1895 or '6, something near that, whenever the Cotton States' Exposition was. I got to be a pretty good-sized boy about that time and was some help to my father and a man named John McCowan, who was associated with my father in his employ or connected with him. [1098] My father stayed in Atlanta until about 1898, just about 1897 or 1898; when he left there, he went to New York. He continued to manufacture this same product during all the time he was at Atlanta, this Koke. Mr. Bloodworth left sometime, possibly two or three years before 1898, and my mother and John McCowan made Koke; of course, I helped when I was around. I do not know whether they owned any interest in Koke, or were just working for my father. In 1898 I went to New York. I stayed in New York for about a year or a year and a half. When my father went to New York he manufactured Koke. He manufactured it in Jersey City. When I left New York I went out west to California. I stayed out there about two years—two years and a half. When I came back from there I went to Nashville; I think it was in 1901, possibly in 1902. When father left New York, two of the children were sick down at Roanoke, Alabama, and I think he came possibly to Birmingham first or Roanoke, and then to Saint Louis, I do not remember, I was, of course, out west at the time, and I only had his letters to go by. When I went to Nashville in 1901 or '2, I

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went in and helped my father manufacture Koke, Celery-Cola, and our other preparations. His place of business in Nashville, the office was in the Vanderbilt Building for awhile, and we had our laboratory in the rear. The difference between the Koke and Celery-Cola was we added celery extract to the Celery-Cola. We sold it, the product, in the syrup or extract form. We did not have a bottling plant in Nashville. Celery-Cola was bottled by Diehl & Lord. I don't think there was very much preference shown to either Koke or Celery-Cola. We sold the Koke to soda-fountains and to bottlers. We continued to manufacture this Koke and Celery-Cola in Nashville till about 1903, I believe, 1902 or '3, then we went to Birmingham, and about the same time we had a plant and syrup business in Saint Louis, along up to and including a part of the Exposition in Saint Louis; we went there for that purpose. I am not so positive as to dates, but that is the way I remember it. At the time we were making this Koke and Celery-Cola in Nashville, it was being made in Saint Louis. [1099] I do not just remember about 1903, as I remember the date, 1902 we went to Birmingham and that has been a good while ago; I do not remember so positive about the different year. My father was not with me all the time I was in Nashville; he was connected with an oil company and he spent a part of his time in the oil field, and a part of his time in Saint Louis. Both of my brothers were with me in Nashville, J. W. & J. C., Jr. They were in school part of the while, too, as I remember it. When

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I went to Birmingham my father was interested there as a stockholder or partner with C. H. Schuyler, in the vinegar and cider business in Birmingham, and Schuyler went to the bad and it was necessary for my father to go down there and kind of take charge; I was in and out of there, too. I was on the road at the time. In Birmingham besides the vinegar and cider business, we manufactured and sold Koke and Celery-Cola and Pepsi-Nola extracts and syrups, in addition to cider and vinegar and hop ale. I did not mean to say we manufactured the hop ale. We bought that from a brewery in Birmingham and also from an extract concern in Saint Louis; a fellow by the name of—let me see—I have forgotten his name, put up an extract of hop ale at that time; it was supposed to be very low in alcoholic percentage to the extent that it was not intoxicating, and I remember the labels. In Birmingham, we took over as I told you, the business of Schuyler, and he was located at 15 South Twentieth Street, and we afterwards moved to Morris Avenue. We shipped the Koke syrup to the dealers in kegs and barrels, half barrels and whole barrels. These barrels and kegs were painted red. They were labeled Koke. I remember we used several kinds of labels when, I believe most every time we had printing done the stationery, shipping tags, etc., there was more or less change in the labels that went on the barrels. This Koke was bottled also in Birmingham. I was on the road, of course; I sold it and I did not do any of the bottling, the actual bottling. I traveled through in sell-

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ing this Koke practically every State in the South, principally Virginia, [1100] West Virginia, the two Carolinas, Tennessee, Kentucky, Georgia, Alabama, Mississippi, Louisiana and Texas. My father continued to manufacture and sell this Koke in Birmingham, until about 1908, I believe that was the year. After that, as I remember it, he went to Shrevesport and Texas, Dallas, Texas and Fort Worth. I continued right in Birmingham. When we wound up our business in Birmingham we had a number of outside accounts and I collected up those and would occasionally ship an order, mail order for Koke, up until about 1910, when he practically took over all the business himself, these accounts I either collected them or they had become outlawed by that time and anyway, I wound up the business for him about 1910. I and my father bought from the Birmingham Bottling Works, from the administrators of P. L. Houppert—I hand you a paper marked Defendants' Exhibit #26, purporting to be an assignment from A. E. Campbell and Frank Seiver, Administrators of the estate of P. L. Houppert, deceased, to J. C. Mayfield and Steve Mayfield and will ask you to examine that and state what that is? This is a bill of sale for the trademark and business, and goodwill of the trademark Dope. That assignment or bill of sale was given to me and my father about the date, about the time it bears date. Let me see the date on that. It is dated the 17th day of May, 1913. Now, I hand you a paper marked Defendants' Exhibit Number 28, signed by the Birmingham Bottling

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Company by E. J. Smyly, president and by Mayfield & Mayfield, by Steve T. Mayfield, and dated the 6th day of May, 1913, and will ask you to examine that and state what that is. This is a bill of sale or assignment from the Birmingham Bottling Company to my father and myself for the business and goodwill of the trademark Dope. Now I hand you a paper marked Defendants' Exhibit No. 29, dated the 12th day of April, 1913, signed by Mayfield & Mayfield, J. C. Mayfield and Steve T. Mayfield, Birmingham Bottling Company by E. J. Smyly, president, attested by A. E. Campbell, secretary, and will ask you to examine that and state what that is. This is a license or agreement [1101] to allow the Birmingham Bottling Company to sell Dope in Jefferson County, Alabama, to sell and distribute it. As I understand it, the Government requires a certain form of assignment or whatever you lawyers call it, bill of sale, whatever it is called, before they will pass on it favorably in Washington, before they grant the transfer of the trademark. And I drew up the first two papers exhibited, or rather my lawyer did, and possibly one or two others in order to get it in legal form and in regard to that question I bought first, rather my father and I, the trademark Dope and business of selling Dope, the accounts for the—that had been made on the books, some little machinery and paraphernalia that went with the business. You understand that the bottling business and business of manufacturing Dope, well, of course, conducted by the Birmingham Bottling Company was kind of,

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separate and distinct affairs, just like a man in business, he will have a mail order business, a retail business and possibly a wholesale business. We bought out the business of manufacturing and selling Dope. The Birmingham Bottling Company's principal business was manufacturing and selling or bottling soda-waters, ginger-ales, seltzers, etc. I have not the list of customers that were turned over when we bought the business of manufacturing and selling Dope. They are either in my father's or my brother's possession. That list of customers was turned over by Mr. Smyly of the Birmingham Bottling Company. I will produce that list of customers if I can find it, and file it in the record. All that is necessary to manufacture the extract or syrup of Celery-Cola, Koke or Coca-Cola is the essential oils, coloring, acid, water, glycerine and other ingredients that enter into the compound, which, when bought from the manufacturers or jobbers come either in barrels or carboys, bottles or jugs, a barrel and a paddle. The percolator is a big tin horn with a strainer at the small end; the way they get the filtered extract of Coca is to buy the macerated leaves which are dried up; they are a kind of greenish color; you place them in the [1102] percolator and that is the way that we made the filtered extract of Coca, and we added alcohol and water in quantities and one or two other combinations, and poured them over these leaves and what come out of the little end of the horn was coca, the extract of Coca, the U. S. P. of which is, I think about 3 per cent cocaine. Hardly

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any manufacturer of Coca nowadays uses that process because they can get a much more uniform piece of goods from larger manufacturers and also very likely it is cheaper and then it is more satisfactory. All that was necessary of the machinery was a percolator, a paddle and a tub or kettle. The machinery turned over to us, as I remember, was the mixing tank and paddle. I asked Mr. Smyly to store them there for me either until I had occasion to manufacture Koke and Dope in Birmingham, or until my father wanted to use them. We did not take these away as we did not have any use for them, because he has a complete plant here in New Orleans, Van Dusen had his plant in Saint Louis.

Q. 105. Was the formula for making that Dope made known to you at the time of making this purchase? A. Yes, sir.

Q. 106. How did that formula compare with the formula for making Koke?

A. Well, practically the same thing, it was the same; there might have been some little minor detail as to some ingredient; but I did not notice it if it was. Of course, I knew the formula for making Koke, and have it in my head and I have had for a long, long time.

The reason we gave this license back to the Birmingham Bottling Company for manufacturing and selling Dope in Jefferson County, Alabama, was that they were selling the stuff practically all over Jefferson County, and it is the fact that they had a mighty good sale on Dope since I came to Birmingham,

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[1103] moved from Nashville; they were strong competitors of ours and the goods were well and favorably known and called for and we were anxious to acquire this trademark Dope, and when they practically give us the whole world and only wanted to keep the exclusive sale of Dope in Jefferson County, why, naturally we deeded it back to them, not deeded it back to them, but gave them this instrument here. The reason these instruments bear different dates was that was a matter [1104] of Government requirement, the United States Government requires, I would have been satisfied to have accepted a verbal contract or statement from the administrators of the Houppert estate, and also from Mr. Smyly regarding this bill of sale, but as I explained in things of this kind, it was necessary to draw up a number of papers in order to fill the requirements of the Patent Office, I believe, as to the legal transfer of the trademark, business, and goodwill of this Dope. I have lived in Birmingham ever since this transaction occurred. The goods of this Birmingham Bottling Company were more or less favorably known. They had done some advertising and they had also had a salesman on the road; they had introduced their goods at different places and when we acquired it, why, naturally, my father began to manufacture the Dope, too, and he has continued to manufacture it ever since. Defendants' Exhibit #32 is an assignment from me and my father of the trademark Dope to the Koke Company of America. We sold the business and goodwill and right to make dope and all that. The Koke Com-

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pany of America was a corporation and my father is president of it. The Koke Company of America has continued to manufacture and sell Dope since its organization or since this assignment to it to the best of my knowledge. That is the signature of myself and father to this instrument, and given on the date it bears date.

Cross-examination.

I was born in Roanoke, Alabama, in 1883. My father was in the lumber business in Florida. Arcadia, I think, is the name of the town. I do not remember the year, just have a faint recollection. He lived in Arcadia just a short time. I can remember hearing my father talk about Koke and I can remember being down at that little place on Trinity Avenue, near Pryor Street, and remember seeing it. I saw them making the extract down there, the syrup and finally the location of the place and the bottles of medicine and stuff, and labels and things that were around there. I know it was koke, because Mr. Bloodworth talked Koke, my father talked Koke and my mother talked Koke and I drank Koke. I know they make Koke because [1105] I drank it. I do not recollect anything else they made. I remember they had some medicine and things down there in bottles. I do not remember anything about Celery-Cola at that time. I do not remember of drinking or seeing Coca-Cola down there. I cannot say I remember the kind of ways the Koke barrels were marked. I can remember the stationery with the word Koke because I used it as a kind of a

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scratch pad. Somewhere about that time, 1892, I cannot remember the date because I was very small. I have forgotten the name of the school I attended, it was located out near the Jewish Orphanage Home. I think it was a public school. I think it was Frazier Street School. The name of my father's company at that time was either the Pemberton Chemical Company or the Pemberton Medicine Company. I do not know whether it was an incorporated concern or not. I do not remember what else was on the stationery of the Pemberton Chemical or Medicine Company, for you might say for my whole lifetime my memory has been associated with the word Koke, it was one of my first recollections and my father being in the business continually I naturally remember that. I have a distinct recollection of seeing Koke on that stationery. That was either the Pemberton Medicine Company or the Pemberton Chemical Company. I think it was the Pemberton Medicine Company. It did not have the name of the officers on it; it had Wine of Coca on it. I do not know where any of that stationery is, or who printed it or anything of that kind. I do not remember anything else it had on it. I do not remember as to the exact time either, it had Koke, it was somewhere about that time, somewhere in my early childhood days. My father was interested in a Hollywood Cemetery in Atlanta at this time, a real estate company just at that time, I do not remember whether he was or not, of course I can remember he was interested in this. I do not remember a concern

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by the name of Standard Bottling Works at that time. I think my father was connected with in 1895, the Wine Coka Company. They made Wine of Coka, that is all they made to the best of my knowledge. I do [1106] not think the Pemberton Company made Wine of Coka. As I remember it now, he was a stockholder in that. I do not know whether he was manager of it. I do not recollect. It might have been or it might not have been. I do not recollect how long my father did business in Atlanta, Georgia. He left Atlanta about 1898. I do not recollect any other concern or name of any other concern that my father did business under in Atlanta except the Pemberton Company, until about the time he left Atlanta. The only one that I do positively recollect is this Pemberton Company. I lived on Ormond Street. I remember father was interested in Wine of Coca but I do not know whether he was a stockholder or partner or what he was. They were on Forsyth Street. I went in their place of business. They were making Wine of Coka. I do not think they were making Koke. I do not know the difference between Wine of Coka and Koke. I do not remember whether the Pemberton Company had a license to do business in Atlanta, or the Wine of Koka Company. In 1896, I suppose the Wine of Coka were still in business there, I do not recollect where they were at all. I think my father was interested in the Hollywood Cemetery Company. He and Eley were trading; they had an office, as I remember it, in the Norcross Building. Possibly it

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was Oakview Cemetery, it just impressed me it was the Hollywood, it might have been both the Oakview and the Hollywood Cemetery, I do not remember about. I do not remember the Guarantee Saving Company. I suppose my father has a pretty good working knowledge of chemistry so far as it pertains to the manufacture of Coca-Cola and Koke. I expect my father left Atlanta in 1898, as I remember it. I believe he came back along about 1901 or possibly before. I was out west at the time and of course corresponded at intervals. I do not remember my father's connection in 1901 with the Standard Bottling Company. I know Mr. Harris personally. I have no stationery he had with the name Koke on it —I mean from 1892 to 1898, that I know of. I do not know where the books are of the Pemberton Medicine Company or Pemberton Chemical [1107] Company, nor of the Wine of Coka Company, nor of the Hollywood Cemetery Company or any of the Companies you allege he is connected with. During the period you have mentioned I can produce nothing with the name Koke on it. They may be in existence so far as I know, but I do not know where they are. From 1892 to 1898 I worked for father as a son would for a father. My mother helped father bottle. Mr. Bloodworth helped him and John McCowan helped him. I do not know whether Mr. John McCowan is dead or alive. My mother was a Mrs. Diva Brown and a Mrs. Budwig, she is now. Mother helped father during those periods, that is from 1892 on to 1898. She worked off and on, she

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assisted my father on the road in selling Koke, and she was divorced from him sometime about—I do not remember the exact date, and went to New York. During that period I do not remember anything about Celery-Cola at all. I do not remember the date Mr. Bloodworth went out of the business. When Mr. Bloodworth went out, no one bought an interest in the business that I know of. I don't know what Mr. Bloodworth took with him or what he got for his interest in the business. I do not know just how long father was in New York. I cannot remember the exact time. I was with him about a year and a half. He manufactured Koke over in Jersey City, on Warren Street, as I remember it. I do not remember about the number. We started to manufacture Celery-Cola there, I think. That was about the time we started. We also manufactured Koke there between 1898, '99 or 1900. I do not just recall the name of the concern there, the syrup or extract company. I do not just recall it, it might have been Mayfield Manufacturing Company, it seems to me it was Syrup and Extract Company. With my father there in Jersey City, besides myself, was my mother and her husband, Judge Brown. She married Judge Brown at that time. Judge Brown lived in Jersey City. I do not remember his initials or first name. From New York I went to California; 1901 or '2 I came back. I was in the Navy in California. I was in the Navy about two years. I went from there to Nashville about 1901 or 1902. My father, when he moved from New

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York, might have gone to [1108] Birmingham, Roanoke or Saint Louis. The only recollection I have is the letters that he wrote me. I remember getting a letter from possibly all three of the places, or from just two, or one or them. I served on the Ship Independence. She was a receiving ship, and on the Alert and let's see, Oh, she was Admiral Faragut's Flagship during the battle of Mobile Bay, an old wooden boat, I forget her name. My father got in with Senator Pettus and Morgan of Alabama and got me discharged. I do not remember what happened to the business in Atlanta when my father left Atlanta in 1898, or thereabout. My being a young chap and any business deals, transactions or things like that I could not know. I left before they closed the business in Jersey City. My father was in business when I left. The next time I took up the business was when I went to Nashville in 1901 or possibly 1902. My father's place of business at the time I took up the business again was in the Vanderbilt Building and the laboratory was in the rear of the Vanderbilt Building in Nashville, in the alley in the rear. Mr. Lord and my father told me that he did manufacture at Diehl & Lord's place. He manufactured there Celery-Cola and Koke. My impression is when he first went to Nashville he manufactured in Diehl & Lord's place. I remember a number of occasions later on when he would sign contracts with a fellow to bottle Celery-Cola or Koke, there would be a verbal agreement or understanding that we were to have a little space to manu-

(Deposition of S. T. Mayfield.)

facture syrup in. My father was connected with the oil business in Nashville. He was not with any bottlers at all. I do not remember that he was with the Tennessee Carbonating and Bottling Company. I do not remember, that he was even a stockholder in that Company. My father put in a contract for the bottling of Celery-Cola, a stock consideration or something of that kind. I do not remember whether the Tennessee Carbonating and Bottling Company ever bottled Koke. They bottled Celery-Cola and different flavors of soda-waters. I do not think any bottling concern in Nashville bottled Koke. At that time we did not have a bottling works. This bottling [1109] works was formed there about the time or just after I left Nashville and went on the road. At the time that bottling concern was formed I was traveling out of Birmingham. I do not know out of my own knowledge whether the Tennessee Carbonating and Bottling Company ever handled Koke. I can only remember one occasion when I was in that plant and then it had been in operation for some time, as I remember it. I do not know just what they did bottle, but it was a bottling works and presumably, they bottled all kinds of flavors and this Celery-Cola too, I think. They might have bottled Koke. The name of my father's business when he was in Nashville was J. C. Mayfield Manufacturing company. I think it was a corporation. He possibly had other interests. The first information I had as to the different companies, the charter for the bottling works in Nashville, was drawn up

(Deposition of S. T. Mayfield.)

in 1904, that has refreshed my memory to the extent that I remember I was traveling out of Birmingham at the time. I had left Nashville. I either left Nashville just before or about the time it was formed, of course I did not know the exact date, either 1902 or 1903. When I came back, I went to work helping my father, that was primarily my object in coming back and I went on the road for him—not immediately, but I went on the road shortly after some time after I came back. On the stationery of the J. C. Mayfield Manufacturing Company was J. C. Mayfield Manufacturing Company, Nashville, Tennessee, Celery-Cola Extract, Botlers' Supplies and something else that I do not remember. We had stationery printed at different intervals and I cannot recall about but just one letter-head. I do not recall whether that Nashville stationery had Koke on it. I remember Celery-Cola on it. I did not write this letter dated at Nashville in August, 1913, to J. Muse & Co., Hodgenville, Kentucky. I do not recall the concern of that name at this time. During the period of 1903 I was selling Celery-Cola. We had two preparations, Celery-Cola and Koke, frequently we would be in a good sized town where there would be two or three or four bottlers, where [1110] it would be possible to sell both and give one the trade name for Celery-Cola and the other Koke, towns of 18 or 20,000 people. At Macon, Georgia we had two, one was named Milliron's, the other I have forgotten. I do not remember which one had Celery-Cola and which one had Koke. I

(Deposition of S. T. Mayfield.)

do not recall just when he was our customer but I recall that in towns which were large enough we used the name, let one bottling company work Koke and the other Celery-Cola. Down in Savannah we had two bottlers. I do not just recall their names. One fellow was named Burns. The price of Celery-Cola at that time depended on the man, his worthiness for a line of credit and what kind of a man he was and so forth, from around three and a half dollars to six a gallon. That was extract. We were making it in syrup at that time, getting a dollar and a dollar and a quarter a gallon. That applies to Koke the same. I do not recall writing to a customer that the cost of the prepared foods, ready for dispensing at soda-fountains, is less than sixty-five cents per gallon, which is practically half the amount you have been paying for similar goods. It is a fact to the extent that a man that bought Celery-Cola in quantities in the extract form could manufacture it for about sixty-five cents a gallon. That is he could put carbonated water to it and simple syrup in it. I do not remember whether we ever consigned any Celery-Cola, or Koke at that time or not. The name of our concern was J. C. Mayfield Manufacturing Company, and was doing business with an office in the Vanderbilt Building and the laboratory was in the rear. At one time it was on Market Street. I do not remember the number. Diehl & Lord was bottling Celery-Cola at that time. Not necessarily all the time but they did bottle quantities of Celery-Cola and Pepsi-Nola. A number of customers bottled Koke. We

(Deposition of S. T. Mayfield.)

had several customers at Nashville for Koke. There was a man at the transfer station, and another one across the street from the Tulan Hotel, and several others, I do not recall. As I remember that was Freed and Haas at the transfer station. I did not do any actual delivering. I think it was delivered to them, as I recall. When we [1111] moved from the rear of the Vanderbilt Building to Market Street, to a two-story building, the second floor was occupied by the Boylin Printing Company, the ground floor we had for our place of business and Boylin began about that time to specialize on bottlers' labels. He issued a catalogue and on the road I would frequently sell labels for him. Now, it was a custom of the printing house to give a good low price for the labels. Boylin devised a scheme whereby—I am not a printer, he would have electrotypes, the matter all made up in electrotypes, I guess with a dozen or two dozen cuts, the name, that would be a label of course and Delicious, Réfreshing, of course something like that, and an attractive label made up in one, two or three cuts, with different colors, the name being inserted in the label, would be matted out where they could set up anything they wanted in there. Now he took all this matter, to set up, it was in a form that contained twelve of these electrotypes, the twelve say he would call them two or three lemon, ginger ale, Koke or Celery-Cola, or two or three other labels, other flavors that a bottler would want, by making a quantity the price was on say 25 or 50 or 100 thousand lots of labels, he could get his whole

(Deposition of S. T. Mayfield.)

season's supply at a very low price, and he naturally wanted an uniform label for his cuts or label and so his customers could recognize his bottled products from his plant, by looking at them frequently he would give an order for say five or ten thousand, whatever quantity he would need in making up the shipment, or order for labels, for so many thousand Koke labels or so many thousand Celery-Cola labels, sometimes as I remember, it would be set up in block type and add the electrotpe for the Celery-Cola and Koke that they would want. The labels for Koke, as I have just explained, were sometimes set up in block, as I recall and sometimes in script. Boylin made labels for us. We had a good deal of advertising for all during that time we advertised Koke and Celery-Cola, more or less extensively. We advertised Koke at that time. We had hangers and display cards. I [1112] have none of them to my knowledge. Mr. Boylin would get up some advertising and other people. I do not recall, I explained to you along about that time, I was a salesman on the road. My father was in and out of the office. I think my aunt was there, Mrs. George Thomas. She is in Nashville. So far as I know, this Tennessee Carbonating and Bottling Company bottled Celery-Cola. That company I think was promoted and formed by my uncle Mr. George Thomas. Diehl & Lord did not bottle Koke, they bottled Celery-Cola to the best of my knowledge. I do not recall the names of the firms that bottled Koke. That has been a good long while ago, but I

(Deposition of S. T. Mayfield.)

sold thousands of people Koke. I do not know who bottled Koke in Nashville at the time I was there. It is a long while ago, and I do not recall who bottled Koke. It is fifteen years ago and selling so many many people I naturally could not recall them. We made Koke up in extract form. The Tennessee Carbonating and Supply Company was formed about the time, or after I left Nashville. I do not know anything about that, or what happened there. My father went, as I understood, from Nashville to Birmingham. I do not remember when we left Nashville. I do not recall what became of the business there. My father went to Birmingham about 1902 or '3, as I remember it. At Nashville, we had a good number of customers, Diehl & Lord was a large customer. Mr. Schuyler was in and under the name, as I recall, of the Schuyler Vinegar Company. S-c-h-o-o-l-a-r, or e-r, I think it was. My father had an interest in that business. Shortly after my father went into the business, my impression is that Schuyler either gambled or got his business in a bad shape or something, anyway my father took hold of it. He operated it as a going concern. It was the Mayfield Manufacturing Company after this transfer was made with Schuyler, but what the business details were I do not recall. I was on the road practically all the time from 1902 to 1908. I traveled for my father. It might have had the name Celery-Cola Company sometime, I do not recall just the year. It was changed to Celery-Cola Company, I imagine somewhere along in [1113] in 1904, 1905, or 6. I

(Deposition of S. T. Mayfield.)

do not even know—well, I could not remember all those details, as I explained, because I was on the road. After the Schuyler Vinegar Company, it was Mayfield Manufacturing Company. That was a corporation, I believe. The Schuyler Vinegar Company were strictly in the cider and vinegar business. When my father became connected with the business, the name was changed at that time to the J. C. Mayfield Manufacturing Company either at that time or some time later. They simply moved the business down to Birmingham, as I remember.

Q. 440. What did the J. C. Mayfield Manufacturing Company continue to manufacture?

A. They continued to manufacture Celery-Cola, Koke, Pepsi-Nola, just as in Nashville. [1114] They had stationery, I just do not recall what was on it. To the best of my recollection it was the same stationery, possibly as we used in Nashville. In Nashville as I recall it, the J. C. Mayfield Manufacturing Company had Celery-Cola on the letter-head. When my father moved the office to Birmingham he moved in a building occupied by Schuyler at 15 South Twentieth Street. He stayed there a couple of years, I suppose and then they moved to Morris Avenue. I do not recall whether they changed the name to Celery-Cola Company then or not. I do not remember what the Celery-Cola Company had on its stationery. The number of the place on Morris Avenue was 2114 and '16, it seems to me we acquired one of those buildings after we moved, but as I remember we were located at 2116 first. I do

(Deposition of S. T. Mayfield.)

not know whether the J. C. Mayfield Manufacturing Company were then in existence or not. It might have been the Celery-Cola Company along about that time. About that time was when the change was made, to the best of my recollection. I do not remember who they were buying their stationery from. They had some lithographed labels, it seems, along about that time with two or three or four colors, and then we had some printed labels in just two colors, and whether they were blue and white or black and white, I do not just recall but the lithographed labels were several colors, I do not just recall. The name of that product I have just described was Celery-Cola and Koke. I do not know where we bought [1115] those labels, being an outside man, but they had a bottling works over on Morris Avenue and labeled the stuff Koke, and made other stuff, ginger ale and other stuff, there was a quantity of Koke and Celery-Cola labels, stationery and advertising. I do not remember what was on the advertising. Naturally I would not know from whom he was buying from, but frequently we give a man advertising with some, either muslin or canvas banners or streamers, some oil-cloth, some tin signs, diamond-shaped hangers, some hangers suitable for display at grocery stores and soda-fountains. That was for both Celery-Cola and Koke. They used sometimes block and sometimes script type, as I recall it. Hop ale was labeled, hop ale, nonintoxicating, and possibly the name of the people we bought it from. We bought it from the

(Deposition of S. T. Mayfield.)

Birmingham Brewing Company in Birmingham, and possibly some Saint Louis house. We did not buy any from Milwaukee. I do not recall about an extract from Saint Louis. I was not selling any intoxicating drink at that time. The State and county laws and the Federal laws were very different, the Internal Revenue Department at Washington decreed that anything containing over one-half of one per cent alcohol, you must have a revenue license; now that would make up on the basis of one gallon of whisky to two hundred gallons of water, hardly a trace, and the State and county and city laws are very different. Now, over in your town, Atlanta, your State courts have decreed that anything under four per cent alcohol is not intoxicating, and well, there is practically no beer that is made that is over four per cent alcohol. We had a Government revenue license. If Mr. Joseph testified that was his regular beer he did not know what he was talking about, either that or Mr. Joseph's brewery misbranded it. We bought the hop ale from Mr. Josephs. I do not know as it was really beer. That was long before the pure food law went into effect. I do not know, I know the State and county laws are very different in regard to what constitutes intoxicating drinks. We were doing a nice business in it. I do not know where the books of the J. C. Mayfield Manufacturing [1116] Company and the Celery-Cola Company are. I cannot recall when the last time I saw them was. I was an outside man. About 1907 or '8 there was a fire down on Morris Avenue. I was not

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there at the time but it occurs to me possibly some of the records might have been destroyed there by the fire and water, but I do not even know, of course, we had records and books there, I did not pay any attention to them. I was selling on the road at that time, Koke, Celery-Cola, cider, vinegar and soda-water, and hop ale. I do not recall anything else made at this place at this time. This hop ale contained more than one-half of one per cent of alcohol. That was the Federal rules at that time, that anything containing anything more than one-half of one per cent of alcohol was intoxicating. I suppose there was a little kick in the cider, it sold. I do not know the alcoholic percentage in it. At Birmingham we shipped Koke in one-half barrels, painted red, with the labels on. We used a stencil part of the time, stenciled on the barrel, and possibly some of our shipping tags had Celery-Cola or Koke on it, I do not just recall at the time, but we had the usual shipping tags where we would ship soda-water, where we would return empties, etc., used different tags and then we had a little printing outfit where we could set up our own tags, of cardboard, say about four or six inches as I recall it, some of them were stenciled on there and some of this stuff did not and in selling this hop ale and soda-water we would say "Return when empty to the house," you see, and possibly on some of the stuff as I recall, was a blank for the names of the parties sending the stuff back so as to keep a record of the empties. As I remember it was used practically altogether on

(Deposition of S. T. Mayfield.)

soda-water and hop ale, that is where there was bottles to be returned. We had a rubber stamp outfit there at that time. I do not think we ever had that for Koke. I do not remember from whom we purchased any labels at all. We bottled Koke down there too. We used bottles, like all the soda-water bottles and mineral water, seltzer and Coca-Cola bottles use, just a standard bottle. It was [1117] just the same as the mills say a fancy flour or a full patent flour, it was a regulation bottle. It seems to me that we did not use the Hutcheson Bottle in Birmingham, we used the crown bottle, had a cap on it. I do not know where we bought our caps from. Some were decorated caps and some were blank. Decorated with Celery-Cola, possibly, Koke, I do not just remember. I do not remember just the time we started using a decorated crown. I remember having Koke on the decorated crowns. We put the crowns with the decorations on them on the Koke bottles, to the best of my knowledge. It seems to me there were one or two who bought Koke in Charlotte and Spartanburg. I do not recall the names of any customers for Koke I have had in any states I have mentioned, the two Virginias, the two Carolinas, Kentucky, Tennessee, Alabama, Mississippi and Texas, it has been a long time ago. My connection with the companies ended in 1908. I continued on collecting in accounts and sold some stuff. I collected up the accouts for the Celery-Cola Company. That Celery-Cola Company han-

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dled Koke, to the best of my knowledge. When I wound the business up, my father went to Shreveport and Dallas, I do not remember which first. I do not want to testify about anything of my own knowledge after having collected up and wound up the Celery-Cola Company. (Copy of a letter written from Nashville, Tennessee, dated August 13th, 1903, handed to witness.) I, of course, do not recall the name of this party, or the town, but I did not stay on the road all the time and frequently when I would come back I would help in the office. It is possible I did write it. That is the letter-head or stationery used by our company at Birmingham, Alabama. We wound up the affairs of the Birmingham branch of the Celery-Cola Company about 1910. All the accounts that were there. It was my principal duty to see if we could not collect up just as many of these accounts as we could. I do not remember what month. After that I worked as advertising man for the Jefferson Theater. When I wound up the affairs of the Celery-Cola Company, I did not have anything to do, up to now with the soft drink business. [1118] First I was advertising agent for the theater and then I went into the whiskey business. The Koke Company of America are manufacturing Koke and Dope, too. I do not know as it is the same drink. I am not connected with either. I did not say anything about the firm of Mayfield & Mayfield. My father wanted the trademark for the word Dope, and knowing it to be extensively advertised and a good demand for it, and

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when he got ready to buy it I figured to take a piece of it, to take a half interest with him. The firm of Mayfield & Mayfield was organized. My father wanted it and I said well, I will buy in with you. This Dope is the product that was in fact manufactured by the Birmingham Bottling Company of Birmingham. That was a bottled product and sold around Birmingham, and is still sold there so far as I know. They had some sale on the road, too. Dope is sold on the market in Birmingham and made by the Birmingham Bottling Works. The firm of Mayfield & Mayfield did not do any business. I practically immediately transferred my interest to my father. My father, I suppose owns the actual trademark, he started to manufacturing and selling Dope. I do not know what the trademark sold for or what the firm of Mayfield & Mayfield got. They got the trademark and goodwill and all the machinery that was necessary to use in manufacturing the product Dope and a list of customers. I think it was \$275.00 my father gave me for my half interest. The check was made by the Koke Company. I turned it all over to him, I turned over the accounts that I testified to this morning and the machinery, appliances, etc., they are subject to the orders of the Koke Company of America. I disclosed the formula too, to them, to my father as president. I could not detect any appreciable difference between the formulas. I could not swear they were absolutely the same thing but to the best of my knowledge they are the same thing. I have

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not got the list of customers that I let go, but my father will get them.

Mr. HIRSCH.—We would like to have this witness produce them. They are in your possession.

Mr. LITTLETON.—We will produce them if they will bring them up. I did [1119] not collect any money from that list. It is just a list of customers and some amounts that were due. I do not remember just what they were. The list of names were primarily in use as a mailing list. I do not know the number, I imagine in the neighborhood of two dozen, possibly something like that. I got open accounts from the Birmingham Bottling Company. I did not collect anything. This machinery, this barrel and paddle and these percolators, I had no occasion to use them. They have never been used to my knowledge since acquiring them. They are still down there in the Birmingham Bottling Company's plant in Birmingham, stored there subject to my request or my order. I bought them because it went with the business, the goodwill and trademark, that was necessary in order to acquire a full title to the trademark. The day may come when I would want to use it and I wanted everything I could get for my money.

Deposition of Alphonse Goldsmith, for Defendants.

ALPHONSE GOLDSMITH.

Direct Examination.

Age thirty. Live in New Orleans. Engaged in the advertising business. Have been in that busi-

(Deposition of Alphonse Goldsmith.)

ness about eight years. The nature of my business is selling advertising specialties, signs and everything pertaining to advertising. I am connected with the Greenduck Company of Chicago, the Cross Press & Sign Company of Chicago, the Baltimore Sign Company of Baltimore, the Southard Novelty Company of Columbus, Ohio; those are the principal companies but I take orders for other companies also. My position is selling representative. I am a free lance, go wherever I want to. I cover Louisiana, Mississippi, Alabama, Georgia, a little of South Carolina and a little of Florida. In my travels about the country I have seen advertising of the product called Koke. I have seen indoor and outdoor signs, caps, wagon umbrellas, as far as I can remember. These signs had on them besides the word Koke, I remember Delicious, Refreshing, at founts, 5 cents, in bottles 5 cents. I have seen advertising of Dope, that was the same thing as Koke, indoor and outdoor, general advertising. I have seen it scattered throughout the South. I remember particularly seeing some in Birmingham. I have [1120] seen some in Montgomery, I think I remember seeing some in Jackson, Mississippi, you see scattered generally throughout the South. I do not remember the exact locations. I can remember seeing it back a few years. I have placed advertising for the Southern Koke Company, Limited, of New Orleans. I placed some last year and some this year, consisting of caps, wagon umbrellas, calendars, indoor signs, outdoor signs, metal

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and paraffine cardboard. He placed considerable advertising with me. I guess it would run about 25,000 pieces.

Cross-examination.

I have no copies with me I have put out. I guess the factories have some samples, Cross Press & Sign Company. Orders in the last few years for Koke amount, I guess, to a couple of hundred dollars, with the Cross Press & Sign Company, and with the Troy Carriage and Sun Shade Company, something over one hundred dollars. The Southwark Novelty Company, I guess, it would run a couple of hundred, two hundred or so dollars. The Baltimore Sign Company would run a couple of hundred dollars, too. The Greenduck, I have not sold any recently, and I cannot approximate that. It is possible I never sold them any from the Greenduck. If I did, it was some time back, and then I have sold some other stuff from time to time from some other concerns. I sold some stuff I had printed right here. I had it printed myself from cuts that I furnished myself, by the De Luxe Press. The orders from that press will run as high as \$125 or \$130, something like that. That was not letterheads and envelopes, that was advertising. I have samples at my office. I will bring those over.

Mr. HIRSCH.—Let the witness go and get them, will you, we want to cross-examine him on them.

Mr. LITTLETON.—All right.

Mr. HIRSCH.—Bring everything you have got, including your order blanks.

I do not know whether I have the order blanks, but

(Deposition of Alphonse Goldsmith.)

whatever I have got I will bring. That is all I was able to gather together at the office. None of these was printed by the De Luxe Press printing company. I have no connection with them, but I have them do my printing. I have no office with them. I have not tried to get anything from the De Luxe Press, specimens. I [1121] will get specimens of matter printed by the De Luxe Press, printed for the Southern Koke Company, Limited, and produce it. These three signs and copy are all I am able to find at my office. The red tin sign (mark "A") was made, my recollection is, the latter part of last year, 1914. That was made in Canisteo, New York, by the Up-to-date Advertising Company. I do not remember how many I made, some for Dope and some for Koke, some in red and some in blue. I guess about five thousand. I guess they were about one hundred and fifty or one and seventy-five dollars, something around there. They were shipped direct to the Southern Koke Company here in New Orleans. I do not know what happened to them after they were delivered to the Southern Koke Company. I have seen them out, I think I have seen some in New Orleans. I think I have seen some in other places; I don't remember where. Sign marked "B," that was made by the Baltimore Sign Company, I cannot say exactly when. I had their accounts for two years, and that was made before I took on their account, because that was one they sent advising me of having made it for him. They asked me to get another order. I did not get one, but got another. I have

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never taken an order from the Southern Koke Company for "B", it was before my connection with them, before two years ago. The sign marked "C," the Baltimore Sign Company made these, the early part of this year, 1,000 Koke and 1,000 Dope were delivered, 2,000 in all. They cost twenty dollars, delivered to the Southern Koke Company. I do not know whether they were put up or not. I do not recollect ever seeing one of them up. The cap marked "D," was made by the Southwark Novelty Company, about a year ago. About a thousand were made. I guess they cost about thirty-seven and a half dollars. I delivered them to the Southern Koke Company. I have seen some of them; I imagine they were used. I have seen some up in Montgomery, Birmingham, Jackson. Teamsters and warehousemen were wearing them. In Jackson I remember seeing some indoor and outdoor signs, among others the celluloid signs I referred to, some drug-store up there [1122] in Jackson had it. I do not remember this one. It was about a year or so ago. I have seen some wagon umbrellas of the Southern Koke Company. I took the order. I do not know exactly how many; I expect something over 100. I imagine they were distributed. I saw them on some wagons. I guess they cost about a dollar and a quarter apiece. They had the word Koke on them, the trademark name, the same as the sign I have produced. I do not remember as I ever seen a diamond shaped sign with the word Koke in the middle and Delicious, Refreshing, at founts 5 cents, the

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Koke being in script, in red, nor any round disk celluloid signs, with Koke in script in red letters, I think it will amount to over \$850, this advertising, because some other stuff that I cannot remember just now, but I have been getting their business right along, quite a bit of it. I am pretty sure it would exceed a thousand dollars. How much more would be a hard matter for me to say. The amount they spent with me in advertising would be about \$1200, back to about a year and a half ago. I first heard of this word Koke five or six years back. It was applied to the soft drink Koke. I ran across it in my travels five or six years ago. I do not remember where, that far back, but I remember the words Koke and Dope. I imagine they were different drinks. I imagine it was the product of the Southern Koke Company. I do not know when the Southern Koke Company was organized. I have heard the words Kope and Dope, I know, prior to 1913; but I do not know whether it was the Southern Koke Company or who made it, but I heard the word. I do not know whether it was a nickname or not, but it was a drink. I first heard of Coca-Cola about the same time, seven or eight years ago. I do not think I ever heard the word Koke or Dope used as a nickname for Coca-Cola. Mr. Mayfield gave me these contracts for advertising. I have been soliciting his business, he never gave me enough. He gave me no reason why he did not give me any more. I know there was considerable business placed that I did not get, but I got my share, I reckon. I had drawings made and

(Deposition of Alphonse Goldsmith.)

submitted them [1123] to Mr. Mayfield. The factory supplied the cuts or drawings. In soliciting these orders we usually get the trademarks and things and send them to the factories to fix, have designs made up and sent back and use them as suggestions for business. Mr. Mayfield always gave me the trademark, letter-heads and one thing and another. He gave me that celluloid sign, if I remember correctly, that was the basis on which we drew up the metal sign. That is the oldest sign, that celluloid sign, the oldest I can remember. The Southern Koke Company have used blotters, practically the same design as the others. I think there was some wording, I do not remember—Delicious and Refreshing, I was of the impression was on the sign, but it is not on this particular sign. Those words “Delicious” and “Refreshing” I see on almost all of them. I have seen it on Coca-Cola. If I remember correctly I am getting up a sign now with Delicious and Refreshing, an exhilarating drink, as a matter of fact I think I am getting up two different signs for them. They are celery drinks. I do not think I have the right to betray the confidence, the man does not want his advertising campaign distributed around. I have seen some calendars of the Southern Koke Company hanging up in bottlers’, I believe I have seen some in Jackson, Mississippi,. A bottler in Jackson, Mississippi I think has one of these Koke or Dope calendars. I saw one about the spring of last year. I have seen it very frequently around, where I have gone in my travels. I call in my travels on all bot-

(Deposition of Alphonse Goldsmith.)

tlers and soft drink establishments as they all spend quite a bit of money in advertising. Advertising of the Southern Koke Company, Koke and Dope, I have seen in soda-fountains, on fences, on wagons and in bottlers' places. I saw it out in Georgia on a fence, somewhere about the center of Georgia, Albany or Americus, last summer, I do not know the exact point. I have seen many signs distributed around, I never take any special note of it or where I seen them. I have seen some tacked up, some hanging, indoor signs, hanging on walls, on tacks and some mirrors. I have seen a number of them around the city here and [1124] Mobile. I make Mobile six or seven times a year and I have seen it several times, some last year and some before, all around the territory. I did not take any particular memoranda or note of it, I just remember seeing it. Some wagons are here with umbrellas on. That is what I mean when I say I saw it on the wagons. I have seen advertising generally scattered over the States. I cannot designate any particular place because I did not take any particular note. I have covered Mississippi, Louisiana, Georgia, a little of South Carolina and a little bit of Florida, and I remember seeing it but I do not remember any specific place. It was within the last two or three years, that I have noticed it. The last two years positively, I can remember, because it made an impression on me. I cannot say exactly where I have seen it in 1913, I have seen it in the country. The year 1914, I have seen it in Jackson. I have seen hangers there, also, some

(Deposition of Alphonse Goldsmith.)

drug-store, some soft drink establishment, some little booth of some sort. I have seen it in some places in Louisiana if I remember exactly, I have seen it in Alexandria, Shreveport, and Monroe, or somewhere in that territory. I have seen it in bottlers' places, I have seen them on fences also. I could not give you the names and give it to you positively, because I do not know. I heard the words Koke and Dope five or six years ago through the territory I have visited, the people at soda-fountains asking for Koke and Dope. I cannot remember that far back having seen signs advertising Koke and Dope. I remember I have seen them. I cannot remember whether it was five or six years ago, but I do not know that I have. I am sure I heard the words five or six years ago, in connection with a soft drink. The drink was called Koke and Dope. I always understood it to be a soft drink, just a soft drink with that name to it, called Koke and Dope. That was my impression. In the territory I have covered, Mississippi, Louisiana and Alabama, I think there was a drink on the market then, Koke and Dope, that had the name on the label, that was my impression. I do not know who made that drink. I do not remember ever having seen a bottle, but [1125] simply called for the drinks. I have heard people ask for Koke and Dope five or six years ago, and I got that impression that Koke or Dope was on the market. I got the impression from hearing people ask for it. I have seen recent advertising of the Coca-Cola Company, "Ask for it by its full name, nicknames encourage substi-

[(Deposition of Alphonse Goldsmith.)

tution," I have noticed that recently. I never thought of what nicknames are referred to in that advertisement. I imagined Cola drinks in general. I do not know what nicknames are referred to. I drink sofe drinks once in a while at soda-fountains. I have heard some ask for Koke and Dope. I hear it generally but do not pay any attention to it. I have not paid any attention to this Koke and Dope proposition except with reference to the advertising, in connection with it since 1913. I get orders from the Southern Koke Company, Limited. I did not get any from the Koke Company of Dallas. I do not go to Dallas or up in Missouri at all. That is the only Koke Company I know. The stuff I have sold was shipped right here. I do not know anything about the Koke Company of America. I do not make Chattanooga. I drink Coca-Cola. I ask for Coca-Cola when I want Coca-Cola. I have never asked for Coca-Cola under the name of Koke or Dope.

Redirect Examination.

I have gone into a soda-fountain and asked for a Koke or a Dope. I have expected to get when I asked for that a Koke or Dope.

Recross-examination.

I expected to get when I asked for Koke or Dope, the Southern Koke Company's drink. I never asked for it except since I have known that concern. I have known them for several years, the Koke Company. I have seen the sign, I feel reasonably sure I have seen the sign since three years ago. I never used the term Koke and Dope before three years ago

(Deposition of Alphonse Goldsmith.)

that I remember. I bought the umbrellas from the Tryon Carriage and Sun Shade Company. This Up-to-Date Advertising concern was at Canisteo, New York.

Mr. LITTLETON.—We offer and tender in evidence Exhibit #33, which is spoken of in the cross-examination of the witness as “A,” and Exhibit #34, the sign spoken of in the cross-examination as Exhibit “B,” and as Exhibit #35, the sign spoken of in the cross-examination as Exhibit “C,” and as Exhibit #36, [1126] the cap spoken of in the cross-examination as Exhibit “D,” as evidence on behalf of the defendants in the above-entitled causes. These cards or hangers with the word Dope on them was the trademark name, given to me on the letter-head, and I simply copied it. If you call this imitation handwriting, it was on the same order, the same character of lettering. In every instance I remember that orders were divided, some for Koke and some for Dope. I thought it was two different drinks.

Redirect Examination.

I do not keep samples of all advertising I place orders for.

Deposition of J. A. Bermudez, for Defendants.

J. A. BERMUDEZ, a witness produced on behalf of the defendants.

Direct Examination.

Age 55, engaged in the carbonating-water business, bottling business. The name of my concern is Cres-

(Deposition of J. A. Bermudez.)

cent City Seltzer and Mineral Waters Company. That is one of the defendants in this case. I live at 1406 Esplanade Avenue, New Orleans; lived there all my life. I am a chemist, graduated at Tulane. I have known of the caramel coloring ever since I have been in the drug business, that is about 1876 or '77. I was with, in 1876 or '77, P. L. Quisacks, 37 Royal Street. He used caramel at that time for all soda-fountain syrups. Mostly all soda-fountain syrups are colored with caramel, take sarsaparilla, vanilla and banana, most all colored syrups are made from straw-colored, you know, to a dark brown or black. Quisack's got out a beverage which is sold through the fountain as Mead. That is put up by McClasky, that has been on the market here a long time, prior to 1877. The formula I have, which is supposed to be an imitation of it, is about the same coloring and is colored with caramel. It cannot be colored with anything else because at that time aniline dyes were not known on the market, that they use to-day. They used caramel coloring to color these different soft drinks at that time. First it gives you a body and gives it appearance, the same as it is put in sarsaparilla syrup to give it a body. I have been connected with the Crescent City Seltzer & Mineral Waters Company about nineteen years, I think. That concern commenced to bottle Koke somewhere [1127] about two years ago, I think, 1913. We bought the syrup from the Southern Koke Company and bottled the stuff. We always bottle Koke in only splits (a bottle mark, #37.) That is one of the bottles. (Defendants' Ex-

!(Deposition of J. A. Bermudez.)

hibit #38) that is another kind of bottle in which I have bottled Koke. (Defendants' Exhibit #39) that is another bottle in which I bottle Koke. (Defendants' Exhibit #40) that is another bottle in which I bottled Koke. (Defendants' Exhibit #41) that is the crown that I put on those bottles. I have not bottled it in any other kind of bottle, but splits bottles like those. That is what we call splits bottles. We get them from the bottle dealers, these junk bottle dealers, we buy them from. Junk bottles, we call junk bottles, we have been using always second-hand bottles. We always put labels on the bottles from the time we began to bottle it. At first we had another label, that is the new label; a sort of bluish label, similar shade to that. We used that blue label, I think it must have been three or four months, I do not exactly remember. That is the new label, the yellow label. (Defendants' Exhibit #39.) That is the label that we changed to. We made the change because the Southern Koke Company sent the label out. We scratched all the labels off the other bottles and put those on and destroyed whatever labels we had or sent them back to them. I do not remember, because we sent them back. We have got a good lot of those, of the others we had only a few. In other words, we quit using the other label after that, and continued using the label on the bottle marked Exhibit #39. That is the only label we had after that. We quit bottling Koke about March or April of last year, right after the Crescent City Seltzer & Mineral Waters Company was sued along with the Southern

(Deposition of J. A. Bermudez.)

Koke Company, Limited. We had some of those diamond signs of the Southern Koke Company, Limited, and I had instructions from the president to see that every wagon was covered with those before the wagon went out, it was done every afternoon by the shop hand. We had some other signs, some umbrellas, and we put them on our wagons. We had some of these little celluloid signs, some calendars, and oh, different things like that, and [1128] blotters lots of them. We gave the advertising to the drivers to distribute amongst our customers, the drivers do the distributing, we do not. Our advertisements consisted principally in decorating those wagons with signs. I have no doubt but what our drivers distributed this advertising matter to our customers over town, I suppose they did.

Cross-examination.

I have made caramel. Caramel will produce different colors, from a very light shade to a very dark shade, light straw and black. That is done by the addition of more or less. Caramel is used for coloring. It is used to produce color, that is the reason it is used in these drinks. Our concern commenced bottling Koke about 1913, I suppose. I saw the contract that was entered into by our concern and the Southern Koke Company, whereby we obtained the rights to bottle Koke. I do not remember whether that contract contained a clause guaranteeing to protect us if suit should be brought against us. Mr. Gillian can tell you more fully about that. He is manager, I am only the secretary. We changed

(Deposition of J. A. Bermudez.)

from these bluish labels to these labels as shown on Exhibit #38, about three or four, maybe five months after we got the other labels, the first labels, I do not remember that, that is all we have down there. We used the bluish labels three or four months. We have not got the bluish labels yet. Those we had we destroyed, and got the new ones, they were furnished us with instructions to scratch off the other label and put this label on. I can tell you about the time we made the change, to the best of my knowledge, and the reason we made the change, the Southern Koke Company sent us a different label. As far as I can remember, it seems to me that I have seen that name Koke by circulars, we generally receive in the office from all the manufacturers of soft drinks like that. In bottlers' papers like that, and samples, I cannot state exactly where I have seen it but I have seen the name. I have not heard it used at all at soda-fountains. I do not go to soda-fountains. I have not heard the expression Dope used, relating to drinks. We discontinued the bottlers' papers for about two years. I saw the word [1129] Koke in bottlers' papers or some circulars I get for different kinds of drinks, for instance, we have different kinds of grape juices, we get the circulars offering us the privilege to bottle the product, the same as we bottle any other syrup, soft syrup. I have taken so little interest in them that I do not think I could very well tell you exactly the time I saw the first advertisement of Koke. I have known it for some time, though. I did not see any of these signs put up, I do not go out.

(Deposition of J. A. Bermudez.)

My business is in the office and yard. I have plenty of the advertisements and signs at the office. I will send them up here. I have got the blotters and I will bring them, whatever I have advertising Koke. I have only had those since I started bottling this product. We are not bottling it now. For Koke we got seventy cents a case. We never sold for less than 70¢. We never bottled a product called Dope, just Koke. We sold from two hundred to two hundred fifty gallons of Koke, fifteen and twenty cases per day. They fluctuate, sometimes we have a driver that will not sell a penny, and another fellow will sell it all. My partner first interested me to take up the proposition with the Southern Koke Company, Limited, of bottling this product. I do not know anything about that at all.

Redirect Examination.

It seems if you put a certain quantity of caramel coloring it does give a flavor. I know I have tried it myself. Just enough to make a drink a light straw color, about the color of ginger-ale, would not add a flavor. If you make it a dark color, the color of Koke, that would add a sarsaparilla flavor. Sarsaparilla looks like Coca-Cola.

Recross-examination.

A large amount of coloring matter is put in a drink like this Koke. I could not tell the difference by taste of this product Koke, with caramel and without caramel. I do not know whether there would be any difference in taste or not. I do not care to express an opinion about that. I am not an expert in

(Deposition of J. A. Bermudez.)

that line. I think if you add a very large amount of coloring in any drink, there would be a difference, and if there is a small amount of coloring there would not be any difference. [1130] I have tried it myself.

Redirect Examination.

Caramel coloring used to color Koke adds body to the drink; it makes it heavier, the syrup is heavier, thicker, denser.

Recross-examination.

Sugar, by itself would do the same thing. The purpose of adding caramel to these drinks is to give color. That is what it is used for, to give it the burnt sugar color. Introduce these exhibits, Defendants' Exhibits #37, #38, #39, #40 and #41, to the testimony of Mr. Bermudez, to be used as evidence on behalf of the defendants in the above-entitled causes.

Deposition of Patrick J. Gillian, for Defendants.

PATRICK J. GILLIAN, a witness produced on behalf of the defendants.

Direct Examination.

Age sixty-nine, live 1126 Royal Street, New Orleans; lived here all my life, about forty-four years now. Engaged in manufacturing seltzer and mineral waters. The name of our concern is Crescent City Seltzer & Mineral Waters Company. I have been connected with that concern since '76, it is about forty—forty-seven or eight years. It has always been known since I have been there as the Crescent City Seltzer & Mineral Waters Company. I bottled a beverage called sarsaparilla. I know

(Deposition of Patrick J. Gillian.)

that all the time in the Crescent City Seltzer & Mineral Waters Company we bottled sarsaparilla. Before that time I was only in the seltzer water business, in my own factory. We colored sarsaparilla with sugar coloring, caramel coloring, sarsaparilla coloring should be the same color all the time. Of course a workman, sometimes he is not careful, he may not make it, but it is supposed to be always the same color. I have seen Coca-Cola. It is pretty much the same as the sarsaparilla we made. I have heard that they made sarsaparilla in 1847, that was the first factory that was put up here, but I was not in the business at that time. Some of the other beverages that have been colored with caramel coloring since 1868, well, most any of the colored drinks, they are colored with it, I think. I think sarsaparilla is, the light coloring of ginger-ale, a light coloring of—oh, well, it is just to suit the drink, you know. I do not know of Moxie. I do not put any coloring to Creme soda. I could not tell about root beer. [1131] I bottled an extract known as Koke. I began to bottle it about a year and a half, or I think in a year and a half, altogether. I got that syrup from this Mayfield firm, the Koke Company, the Southern Koke Company, Limited, of New Orleans. They gave us advertising matter. I am sure it was distributed, because I covered the wagons all over, it is better than distributing it, it covers the wagon all over with it, and wherever the wagon went it was advertising. I think advertising matter was given out to the dealers. I am not sure of that because we had the ad-

(Deposition of Patrick J. Gillian.)

vertising matter there, umbrellas, caps and all that kind of thing. I cannot remember whether we gave it to the customers or not, but I believe we did. Our company never sold Koke to our dealers as and for Coca-Cola, not as I know of. The company did not do it, the driver might say it is as good and the Coca-Cola Company say mine is better, and the driver say the Koke is better. I suppose so, but I did not hear them say, but that is about the way the drivers do.

Cross-examination.

I think I have the contract that was entered into between our company and the Southern Koke Company for the bottling of this product Koke. I think I can find it. I will send it up if I can find it. I cannot remember anything in it; I do not know whether I have it or not now, I will tell you, but I did have an agreement, but I do not know if I can find where the copy of it is now. I cannot remember that that agreement had in it any stipulation as to the defense that the Southern Koke Company would put up if someone would bring suit against us for using the name Koke. I did not require or request that that be put in there. I think that I asked this question, whether that would get us into any trouble by selling this Koke. I think I asked one of those questions. I am sure I never would have filled a bottle with it if I thought I was doing anything wrong. When anyone comes in I ask the same question, because I do not know who I am dealing with first, and I want to know whether I have a right to bottle it at any time. I cannot remember at the time

(Deposition of Patrick J. Gillian.)

we were talking about entering into this contract about any questions in regard to the names Coca-Cola and Koke. [1132] I had heard the name Koke before this contract was offered to us. There was mail forwarded to the office which offered it to me some months before that. I heard it from drummers coming in about the Koke Companies. I could not tell how long. I have heard of both Koke and Dope and heard of Coca-Cola, also. Have heard Koke and Dope applied to Coca-Cola. Drummers coming from one State and another, I have heard them speak about Coca-Cola, and Dope and Koke and all that. I did not take any interest in that. I have not heard Coca-Cola calle Dope and Koke, because I know that Coca-Cola and Dope is not the same thing. I know very well sarsaparilla and Coca-Cola is not the same. I have never drank a bottle of either one, Koke or Coca-Cola. I drink whiskey. If I can find that contract I will bring it but I am not sure because I have got papers in my pocket now, and I will take them out and put them in the desk this evening and a day or two afterwards the children have been around there and they clear my papers, first one place and another. I sometimes have a good deal of trouble. Now, that paper, like Koke and Dope and that sort of thing, I give very little attention to that because I never cared to sell a drink, only what I manufacture myself. It seems to me that if I did not have the right to use Koke, if I had known about this matter I could have hunted up that paper and told you to the point, but I tell you I cannot remem-

(Deposition of Patrick J. Gillian.)

ber all these things as my memory is not as good, and I have been sick, and I do not want to say anything for another, I want to be very sure. I saw my attorney about that contract. He saw it. I do not know how much my attorney examined it. He attends to all my business.

Mr. HIRSCH.—I will reserve further cross-examination until I see the paper.

Deposition of A. C. Juhl, for Defendants.

A. C. JUHL, a witness on behalf of the defendants.

Direct Examination.

Age, forty-three; live New Orleans; lived here a little over a year. Engaged in advertising specialties. The name of my concern is Crescent Advertising Novelties Company. I lived before I came south in Jersey City, New Jersey, and New York. I heard of a product up there known as Koke, just about the Spanish-American war, '98, when we were loafing in Jersey City. I was a member of the Palmer Club, [1133] and we were joking about what kind of stuff that was, we thought it was some kind of Dope. I understood that the factory was down on a street near Washington Street, the other side of the Post Office. I never went there personally to look at it. My occupation at that time was electrical work, doing work for the Government, transport service. Since I have come to New Orleans and gotten into the advertising business, I have had occasion to do advertising for the Southern

(Deposition of A. C. Juhl.)

Koke Company, Limited. On three different occasions, calendar orders for two and the third order was an order for hangers. I also made a design for Mr. Mayfield on another order. Those hangers were imported hangers, with different pictures of women, with the different names of Koke on it; they were to be used at a fair somewhere in Florida. (Calendar marked Exhibit #42.) That is a sample of one of the calendars I got up and delivered to the Southern Koke Company, Limited. Thirty-one hundred or thirty-two hundred of them. I have not any of the other hangers, copies of the other hanger, or any of that advertising I have done for them. Nothing except that sketch there which I designed. I delivered them in full, that I printed, and kept it because I wanted it to check proofs on them. I have seen Koke advertising around New Orleans, aprons, caps, large umbrellas, wagon umbrellas, and hangers.

Cross-examination.

I lived in Jersey City right back of the courthouse on Pavonia Avenue; I could not remember the number; it is right back of the courthouse. I lived in West Hoboken and Jersey City about fifteen or sixteen years. I heard of the product Koke 1898 and '99, during the Spanish American War. I could not give the exact date. Somewhere around there because I was in the transport service. I did not know Mr. Mayfield at that time. We knew there was a new enterprise there, we were members of the Palmer Club and knew what was going on in town. I believe the Palmer Club is in existence. I do not

(Deposition of A. C. Juhl.)

know the name of the concern that manufactured it. We wondered what kind of stuff that was, that is like you will discuss matters in a little town like [1134] Jersey City. I never drank it. We just heard of it as Koke; I did not see any advertising there, just heard of it. I do not remember the name of the concern, if I knew it I would not remember. I never knew the name of the concern. I knew it was a new enterprise. We thought it was such a funny name, Koke. If we knew what Koke was, everybody knew what koke fiends are, that is what caused us to wonder. That was the impression. I made up the calendars for the Koke Company sometime in either last October or November, 1914, of this last year and this last order was taken February, 1915, and delivered just about a week or ten days ago. The hangers were made before that, must have been about the 4rd of October, some months ago, and he gave me that. However, it was a personal thing, and he used it for a fair. For some fair down in Florida. They have been shipped. That was October, 1914, somewhere around there. That was the company's check made to me personally; it was not a company order; it was some stuff I had. I had those designs I have made up. This has not come out. I have not done anything with them. I just got the price from the factory yesterday. The backs of the calendars were manufactured in Philadelphia; we did the printing here, and put the pads on. Ketterlinos Lithographing Company of Philadelphia made the backs. They made

(Deposition of A. C. Juhl.)

the last ones. The first ones came from Germany, Bremen. The hangers that I got out in the early part of October, 1914, were printed by Alkirk & Selden. The design I bought them here from a man named Durper. These advertisements I refer to, I have seen boys wearing the caps, and I have seen lots of laborers, drivers and porters with them, and in Mr. Mayfield's place I have seen bottles there, with the name Koke right across it, and his product there. The calendar printing was done here. Mr. Mayfield supplied the copy for that printing. He told me what to print on the calendar, that is customary for the customer to tell you what he wants printed and how and I worked it up. Mr. Mayfield had the initiative, the final say. Mr. J. C. Mayfield, Sr., that is the one I did business with. The gentlemen [1135] at the Palmer Club that I discussed this matter with, two are dead, one George Williams, I do not know what has become of him. I do not know who else, all the boys have left town. George Williams is somewhere down in South America. I could not tell you the street of the Palmer Club. I think since I left they consolidated with the club on the hill. I think the club, the Palmer Club, was taken in by the club on the Boulevard, on the hill. Everybody knows the name of the club on the hill, I think it is on Coleman Avenue; everybody knows it there.

Redirect Examination.

I have not paid much attention to the advertising of the Southern Koke Company. I suppose I could go out and pick up a dozen of them, I do not remem-

(Deposition of A. C. Juhl.)

ber just now where. I can direct you to one place within two or three blocks of here where you will see two bottles standing behind the bar. I heard of Coca-Cola around Christmas, 1905 or 1906. I was at the Biedmont Hotel, and, well, I happened to hear about it there. I never paid any attention to it, to the concern, about the fortune the man had made and the small sum, I always understood, though rumor had it that he paid some small sum, and if memory serves me right he paid six hundred dollars for it and made a fortune out of it. I had not heard of it in 1898 in Jersey City. I had never known of any advertising of it up there at that time.

Mr. HIRSCH.—I move to strike that part of the answer which refers to the rumor as hearsay and incompetent evidence.

Objection overruled and appeal prayed and granted.

Mr. LITTLETON.—I tender and offer in evidence the calendar presented by the witness, as Defendants' Exhibit #42 in the above-entitled causes.

Deposition of James L. Wright, for Defendants.

JAMES L. WRIGHT.

Direct Examination.

Age, thirty-three; live New Orleans; lived here six years. I am secretary and treasurer of the Pan-American Life Insurance Company, and also the quartermaster-general of this state, of the National Guard. I have held the position with the insurance company since it was organized in April, 1911. I

(Deposition of James L. Wright.)

was connected with the Southern Koke Company, Limited, of New Orleans. It will be a rather historical sketch. My father-in-law, Mr. E. M. Boyd, of Dallas, was connected with the Koke Company of [1136] Texas at Dallas. I think he was vice-president and general manager. Mr. McCarty Moore was the president. Mr. Boyd had charge of the sales and the office there in Texas, having been a traveling salesman practically all his life. The Koke Company of Texas had been rather successful and they decided that New Orleans would be an advantageous place to locate a similar establishment for the trade down in Louisiana and Mississippi. They made some arrangement with Mr. Mayfield, president of the Koke Company of America, for this territory, and Mr. L. S. Scott was interested in the proposition by them, and put up a good sum of money; I do not know just what his investment was, becoming the secretary and treasurer and the general manager of the Southern Koke Company. At the time the company was organized, Mr. Moore came to New Orleans, I think it was in the latter part of 1911, to complete the organization, having secured a charter and by-laws and the necessary legal formalities. They held a meeting in my office at which Moore was formally installed as president, I as vice-president, for the purpose of completing the organization, and Mr. Scott as secretary-treasurer. I think Mr. Boyd and Mr. Mayfield were both put on the board of directors, but I do not remember that there were any other officials named under the char-

(Deposition of James L. Wright.)

ter and by-laws. The Southern Koke Company, Limited, was organized about 1911. That is my recollection of the time. I think it was the same year; it was the fall of the same year our insurance company was organized, and that was 1911. I was simply—you might say a dummy director, put in for the purpose of completing the organization and Mr. Boyd and Mr. Moore seemed to think they were under some obligation to me, so each one of them transferred from his common stock, two hundred fifty shares of stock into my name, a total of twenty-five hundred shares, to which I attach very little value, if any. At that time, Mr. Scott had the active charge of the affairs of the Southern Koke Company. I have known Scott ever since I came to Louisiana. I was located at Crowley for several years in the rice business before I came to New Orleans, [1137] where I first knew Scott as a newspaper man, and when I first went to Crowley, Scott had the reputation of being a drinker, and he apparently reformed and for a period of some three or four years he went along without drinking at all. Several of us up there at Crowley became interested in the Antigua Gold & Copper Company which owns a mining property in Honduras, in which Scott had invested considerable money, and that was one of the primary causes of my coming to New Orleans, to look after the interests of the people who had put their money into the proposition. Scott went along for quite a while without drinking, but when we began to have financial difficulties with the mining proposition he

(Deposition of James L. Wright.)

fell off the water wagon pretty hard, and then for a period of almost four years he was drinking off and on all the time. Scott left New Orleans when we had to suspend operations of the mining property on account of the lack of capital and went out to Mexico where he made considerable investments. He was a fellow of considerable means, but I think his Mexican investments did not prove very satisfactory and he came back to New Orleans in the summer of 1911, if I have my year correct, to go into this Koke proposition, regarding which he had had some correspondence with Moore at Dallas and for a little, he was sober, I should say for a period of five or six months, then he began to drink constantly. There was hardly a month that passed that he was not drunk several days at a time, in fact, it gradually got worse, that is the reason of my becoming the president of the Koke Company, his constant drinking made it impossible for him to attend to business. I later become president of the Koke Company. Scott began to drink so heavily that at the suggestion and request of Mr. Boyd and Mr. Moore I was elected president of the company so as to exercise some control over the business, particularly the bank account. When Scott was sober he was one of the most economical men I ever saw in my life, but when he got drunk he spent money like water, and apparently when he was drunk, he did not know what he was doing. Anyway, he would draw out [1138] every dollar he had in his own bank account and then he would draw Koke Company's checks. So I took the

(Deposition of James L. Wright.)

presidency for a short time, until some change could be made in the management of the old company, to protect Moore and Boyd and also Mr. Mayfield. During my connection with the company, I did not know of any employee there that had a mustache, a little black mustache. Scott had a stubby red mustache part of the time, but my recollection is Scott was clean shaven most of the time during the last few years of his life, if not entirely so. Scott was killed in a street-car accident in April or May, 1913, here in New Orleans. A man by the name of I. A. Whittle never worked for the company that I know of; that man Whittle, during the time that we had practically taken the management out of Scott's hands, and had placed local man named William Dalton, in charge, came into the office if I remember the statement made to me, correctly, accompanied by a man named Cheevers and bought a few shares of stock. Then, a few days later on he went back to the Koke Company's office and demanded a list of their customers, which Dalton refused, and he stated that he had been advised by his attorneys that he had the right of access to the books, so Dalton brought him up to see me. I questioned him fully and found out he was a bartender in some little up-town saloon and I was not entirely satisfied with the manner in which he conducted himself in my office and after cussing him out I ordered him out of the place. However, I advised Dalton that rather than have any trouble with him the best thing to do was to give him back his money and I believe that was done, al-

(Deposition of James L. Wright.)

though I do not know such to be the case. I had absolutely no connection with the active management of the business at all, and had no dealings with the salesman, except to call the men off the road when Mr. Scott was killed, but my understanding of the instructions which were given to them by Mr. Scott and others connected with the company in Texas, were that they were to sell this Koke on its own merits. My understanding of the adoption of the word Koke was that there were frequent demands, or calls rather on the part of buyers of the various soft drinks for Koke and Dope [1139] and similar terms and that the word Koke was adopted to take advantage of that demand. That was my understanding of the adoption of the word. I was told that the word had been copyrighted by a manufacturer of a similar soft drink in Tennessee or Kentucky up there somewhere, and this copyright on the name was purchased by Mr. Mayfield or his associates. That is all hearsay so far as I am concerned, in fact I do not really remember who made the statements to me.

Mr. LITTLETON.—We object to that part of the evidence and move to strike it out on the ground that it is hearsay.

Objection overruled and appeal prayed and granted.

I am not connected in any way with the Southern Koke Company, Limited, now. I ceased my connection shortly after Scott's death, the object for which I was asked to temporarily become president was

(Deposition of James L. Wright.)

made unnecessary by Mr. Mayfield buying the Scott interest and taking charge of the business. My connection with the company was merely nominal. I had no active connection with the company at any other time. At the time of its organization, as I have already explained, I was simply used as a dummy officer or director to complete the organization and then when Scott began to drink I nominally took charge of the business until someone representing the other stockholders in the company could take charge of the business. During all the time I was connected with this Company I was carrying on my insurance business. I very seldom went to the Koke Company's office at all. They occasionally brought me a check to sign and that was about the extent of my active connection with the company. I believe I am a defendant in this case, I am not sure. I am nominally, like I was with the company.

Deposition of O. M. Anderson, for Defendants.

O. M. ANDERSON, a witness produced on behalf of the defendants.

Direct Examination.

Age, thirty years old; live New Orleans; engaged in Cooperage business, dealing in second-hand and new barrels. We handle all sorts, you might say, wine barrels, whiskey barrels, oil barrels, sugar barrels, flour barrels, soft drink barrels. We sold barrels to the Southern Koke Company, Limited, of New Orleans. We [1140] sell them all sorts, that are taken in at our place, all soft drink barrels we

(Deposition of O. M. Anderson.)

take in go to the Southern Koke Company and they are the only people we sell them to. The whiskey barrel up to the early part of this year is worth \$1.20; we have been letting the Southern Koke Company have the full barrels for 90 cents and the three-quarter barrels for 90 cents and the kegs for 50 cents. If a man putting up that syrup asked us for a barrel suitable for that purpose, it is the only one we would give. It is cheaper than any others you could get. Whiskey barrels, as I say, are higher priced, and wine barrels, and then the wine barrel may spoil your syrup. We class soft drink barrels as Coca-Cola barrels, to distinguish between the whiskey barrels, wine barrels or other tight barrels.

Cross-examination.

We classed them as Coca-Cola barrels for the purpose of distinguishing between wines, whiskies, etc. We did not class them as Koke barrels because the name that we got hold of is Coca-Cola. It may have been that the first barrels we got in that line were labeled Coca-Cola, and we called all the other syrup Coca-Cola, that is something you ask me to explain as I see it. That was before my time. I have been with the concern since last March, but I have been through the books and know the working of the concern since long before I knew it. They are all classed as Coca-Cola barrels, not necessarily red barrels, any sweet syrup barrel that comes in we class as Coca-Cola barrels. I could not say that any other syrup barrel where we received is different colored, but I do not know any sweet syrup barrel we get in

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suitable for the purpose of the Southern Koke Company, or anyone we sell, we would class as Coca-Cola barrels and send it up to them. Whenever we have fifteen or twenty we call them up and say we have so many full barrels, so many halves and so many kegs and can they take them all and we just send them up. They are all re-coopered before we send them. I mean by being re-coopered by driving up the hoops, the labels are destroyed; I know positively there has never a barrel left our place unless the labels were destroyed, the hoops redriven, tightened up. There is not a barrel that you pick [1141] up on the street that does not need it, and if we find any holes we make them tight. We do not clean the barrel by driving steam through it, that is all we do. A lot of these barrels have had Coca-Cola in them, it may be most of them, I could not say positively.

Deposition of J. W. Mayfield, for Defendants.

J. W. MAYFIELD, a witness on behalf of the defendants.

Direct Examination.

Age thirty-one. J. C. Mayfield is my father. I was born in Gainesville, Florida. I lived after that in Roanoke, Alabama until I was about five years old, then we moved to the springs, after a short time. I do not remember which springs they were and then we went over to Atlanta. We went to Atlanta about 1890, I guess, in either 1890 or '91. My earliest recollection of any business my father was engaged in was about 1890. It is just a slight re-

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membrance and I do not know whether he was in business in Roanoke or not, but I remember seeing his name there, later on in years. "Mayfield & Pitman," up there, a grocery and supply business. I went to Birmingham in 1898 or '9. I was in the syrup business then, making Koke, Celery-Cola, Pepsi-Nola and in the bottling business. I helped my father in that business. I did practically all the bottling after I learned how, and did a lot of mixing, painted the kegs and acted as shipping clerk. I painted the kegs red. I stayed in Birmingham in that business about a year and a half, then I made a trip over to Atlanta from there. We had some business over there and my father was going on up to Nashville and I went over to kind of look after things over there.

Q. 21. You mean you went over to look after selling Koke? A. Koke, yes and Celery-Cola.

Mr. HIRSCH.—I object to that question and answer as entirely leading.

Mr. LITTLETON.—The question is leading up to something else.

Objection overruled and appeal prayed and granted.

I stayed in Atlanta not over four or five months. While there I sold Koke and Celery-Cola. From Atlanta I went to Nashville. In the same line of business, all the way through, selling Koke and Celery-Cola. There was another one there at that time, we were making a pepsin drink, a different colored [1142] red drink. I stayed in

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Nashville and continued that business up until about 1903. From there I went to Saint Louis. We had the same line there and did a little business up there. When I was in Saint Louis we had a bottling plant. I worked in the bottling plant, worked in the laboratory and we had a soda-fountain at the Suburban Park, ran a soda-fountain business at Suburban Park, and sold Koke out there. That was 1903. We were manufacturing Koke in Saint Louis, too. From Saint Louis I came back to Birmingham and did the same thing I did in Saint Louis, we had an office there and I worked that office. We were making Koke, Celery-Cola and Pepsi-Nola, a general line of extracts, and then we were jobbing some goods there, vinegar. I stayed in Birmingham that time, about a year or so. At these different places, Birmingham, Nashville, Saint Louis, where we were engaged in the business of making and selling Koke and Celery-Cola and these different syrups the business was practically owned by my father, I think he had a couple of business associates. All the different times I was out in the territory working, selling goods, from Birmingham, I made a trip down thru Georgia and Alabama, I went to Florida and worked Florida, come back up to Savannah and caught a boat from there and went to New York, and Atlantic City. That was a business trip and pleasure trip combined, mostly business though. From there I came back to Birmingham. I was on the road at this time selling Koke, Celery-Cola, Pepsi-Nola. I stayed in

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Birmingham until about 1907. In 1907 I made a trip out to Dallas. I opened an office there, a laboratory. We had a big mail order business out there and I filled these orders for Koke, Celery-Cola and Pepsi-Nola. On that trip, I made a trip up through Oklahoma and got full of malaria and I had to come back east. I stayed in Dallas at that time in the office six or seven months. When I left there I did not leave anybody in charge. I just had to pull out and come away. When I came back east, I think I stayed in Birmingham a short while. After that, I went up and opened an office in Richmond, Virginia. Selling goods the same line, [1143] Koke and Celery-Cola. I think I stayed there about six or seven months and then come back to Nashville. I just worked the territory out of Nashville for a few months. After I left Nashville I went up to Indianapolis, Indiana and worked all that territory, northern territory, Indiana, Ohio and Michigan selling Koke and Celery-Cola. I stayed in Indianapolis about a year. After that I went back to Texas, to Dallas. Down there I was on the road selling goods from headquarters at Dallas. From there I went right on through to the east coast, and went up thru the Carolinas and Virginia. I have been on the road selling Koke for my father's business since about 1900. During all of that time I have sold Koke and Celery-Cola exclusively, only one time for about two months I carried Jersey Creme out of Dallas for a side-line. In a small way I have been on the road, well, I can

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safely say for fourteen years I have been peddling Koke and Celery-Cola, that is the salesman's way of expressing the sale of his goods. I am selling Koke now, with the Southern Koke Company, Limited of New Orleans. I have been on the road since I was about 16. I worked Houston, Texas, opened a small laboratory out there and did business. I was in Houston about a year. I sold Koke out there.

Cross-examination.

Q. 84. You have not mentioned about being in Chicago; you were in Chicago during March and April, 1913, under the alias of Jerome Gibbons, and you were referred to as the "Coca-Cola King" and were lodging with a Mrs. Earl, or in her rooming-house at 147 Erie Street, and living there with a woman not your wife, and with that woman you said you traveled from state to state and gave her the money with which to pay her own transportation, for which she paid.

Mr. LITTLETON.—We object to that question as irrelevant, incompetent and advise the witness not to answer the question. Objection overruled and appeal prayed and granted.

Mr. HIRSCH.—Does the witness refuse to answer?

WITNESS—Yes, sir. Q. 85. You refuse to answer any part of that question or do you refuse to answer just part; were you living in Chicago during March and April, 1913, were you in Chicago?
[1144]

Mr. LITTLETON.—I do not advise him not to

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answer that part of the question.

A. I reckon I was. I do not know one Jerome Gibbons. I did not go under that name. I was never referred to as the "Coca-Cola King" or words to that effect.

Q. 90. Did you live at the lodging-house of Mrs. Earl at 147 West Erie Street?

Mr. LITTLETON.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled and appeal prayed and granted.

Mr. LITTLETON.—I do not object to his stating where he stayed in Chicago.

WITNESS.—I refuse to answer that question. While I stayed in Chicago I had some relatives, and stayed with them sometimes, and stayed with a friend out on the north side. West Erie Street is on the north side. I may have spent a few nights there. I was up there in Chicago in part of 1912. I think I was in Chicago in March and April, 1913. I think I was in the same line of business, selling goods. I was selling Koke. I made a few trips over in Ohio, made some Celery-Cola there, but never did I sell any Celery-Cola in Chicago. I never attempted to sell any Celery-Cola in Chicago. I think there was a party come in to Chicago from Dallas by the name of Boyd representing the Koke Company. He was up there for about a month, trying to organize a company, the Western Koke Company. I am not positive it was in those months March & April, but he was certainly up there.

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Redirect Examination.

(Defendants' Exhibit #43.) I got this bottle in Nashville the 11-30-14, November 30th, 1914. I bought it at the Crockett Cafe. I asked for either a call for a Koke or a Dope. This is a bottle of Star-Cola. I got that from that cafe in response to a request either for a Koke or Dope. (Defendants' Exhibit #44.) I bought this on the same day at Nashville, Tennessee of W. P. Watson, opposite the Terminal on a call for Dope. I identify it as the bottle I bought. I pasted the label on there and put my signature. That is also true with respect to Exhibit 43. That is a bottle of Diehl's Star-Cola, that was served to me in response to my request for Dope. After I bought them I wrapped them up in a piece of paper and sent them to A. B. Littleton in Chattanooga, Tennessee. (Defendants' Exhibit #45.) I got that bottle the same day [1145] from Harry Seidell down on Third Avenue, Nashville. I either asked him to give me a Dope or told him to give me a Koke, I have forgotten the expression I used. It was marked, that is a bottle of Star-Cola. I labeled that like the other. That is the label I put on. (Passing label to witness.) I identify it as the label I put on. It has my signature on it. (Defendants' Exhibit #46.) I bought this bottle from the Peels Bar, Birmingham, on a call for Dope. That was on December 16, 1914. It is a bottle of Cola-Nip. I put that label on there. I identify that as the label I put on the bottle, because I pasted it on the bottle

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and put my initials on it. I got that in response to my request for Dope. (Defendants' Exhibit #47.) I bought this in Birmingham on the 16th of December, 1914, Mecca Hotel, in response to my request for Koke. (Defendants' Exhibit #48.) I got this from, I will have to spell it—S-v-i-b-o-n-a at Bessemer, Alabama on Dec. 16th, 1914. I asked him to give me a bottle of Dope and he gave me this Cherro-Cola. (Defendants' Exhibit #49.) This is a bottle of Rye-Ola from Simp Burvin Grocery Store, Bessemer, Alabama on December 16th. I went in there and asked him for a bottle of Dope, December 16th, 1914. It is a bottle of Rye-Ola, (Defendants' Exhibit #50.) I bought this from—November 13th, 1914, at Jess McCall's, Nashville, Tennessee. I asked him for a Dope. That was served to me in response to my request for a Dope. That is Gerst's Cola. (Defendants' Exhibit #51.) That was bought from the Reliance Bar in Birmingham on December 17th, 1914, when Dope was called for. That is Kola-Rex. (Defendants' Exhibit #52.) I bought this from W. L. Delheim's Saloon on the 17th day of December, 1914, when Dope was called for, and I got Dope. That is Dope in that bottle. (Defendants' Exhibit #53.) I got this from Johnson Brothers Saloon in Birmingham the 17th day of December, 1914. I asked for Dope, and got C-o?C-a—I do not know whether it is Coca in it or not. C-o and a question mark C-o. (Defendants' Exhibit #54.) I got it November 30th, 1914, in Nashville from Mike St. Charles. I asked for Dope

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and this bottle contains Star-Cola. When I bought these bottles, at different times I would go in at one time I would [1146] say give me a bottle of Dope and again I would say give me a bottle of Koke, and they would serve these to me in response to my request. I put the labels on all those bottles and that is either my name or signature or initials. After I bought them, I labeled them and sent them to you.

Mr. LITTLETON.—That refers to all those bottles.

Recross-examination.

In Chicago, Illinois during my stay at that time, in March and April of 1913, I sold some Koke to the Wilson Drug Company, I think. I called on so many people then I cannot remember those. I think I put in a barrel to the Home Drug Company in Chicago. I am not sure now. I do not remember on April 24th, 1913, of standing on Monroe Street talking to a gentleman and saying to a gentleman, that “at the Home Drug Company the two drinks got mixed,” and the Koke is in the Coca-Cola urn, or vice versa, but no harm would come from it as no one could tell the difference, what is the harm? I never made that statement, to that effect. I never made any statement like that, that would convey that meaning in any way, shape or form. Then or at any other time did I make a statement of that kind. I do not know anybody by the name of Mansfield or Warbles. I cannot recall names back that far. I meet too many people, if I saw him I would probably know him if I ever met him. I was

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up in Chicago all during that time, April 1913. I did not give those out in Chicago at all (Complainants' Exhibit No. 19.) I gave some of them out in Mississippi and some of them out in Alabama, and same in Florida, it was within the last fourteen months, I think. I do not think I gave to Mr. Warble, one of these cards, in Chicago in April 1913. I do not think that card was printed at that time. These cards were printed after that. I was out at the Haynes Brothers Bottling Company, I do not know whether it was on April 8th, 1913, or not. I do not know whether I ever told anybody in Chicago that I sold syrup to the Ashland Pharmacy, to the Annex Pharmacy and the Auditorium Drug Company there. I do not know whether I made that statement or not. I think I sold goods to that chain of drug stores. I do not [1147] know whether I sold Koke to the Auditorium Pharmacy, K-o-k-e, or not. I never obtained a bottle of Coca-Cola from the cigar clerk for the purpose of taking it out as a sample to sell any product. I do not see what I would have any use for a bottle of Coca-Cola. I did not tell any gentleman in Chicago on that date that I had obtained a quart of syrup from—syrup which I, Mayfield, told this gentleman was Coca-Cola, and I said I was going to a drug-store on Wilson Avenue and Sharon Avenue in Chicago. I do not remember of buying any Coca-Cola syrup. I cannot affirm or deny it. I do not remember, but to the best of my recollection, I never have had any use for Coca-Cola. I know a Mr. Carpenter. I do not remem-

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ber Mr. Hooper. I met so many of those boys up there, soda-dispensers and I do not know who all I met up there. I do not remember anything about Mr. Carpenter and Mr. Hooper coming in while I was talking to Mr. Warble and obtaining a quart of Coca-Cola syrup which I said I was going to take to a drug-store on Wilson Avenue and Sharon Road. I do not remember Mr. Hooper telling me at that time, that he would order a barrel of Coca-Cola syrup, as he is boosting it. If he is the one I think I know up there, he is one of my friends, and if he is a soda-dispenser and he was trying to push my goods, I do not recall while I was talking there that Mr. Carpenter and Mr. Stearns, soda-dispensers for the Wilson Drug Company, Wilson Avenue and Sheridan Road, entering and joining me.

Q. 125. Did not Cooper and Stearns say to you at that time, that he Stearns, could easily sell a good deal of your syrup as there was no one who could tell the difference between Coca-Còla and Koke, and did not you say in reply "that there is no difference, that he sells it and bills it Coca-Cola"—that you sell it and bill it as Coca-Cola, that the trademark is the same. I should say I did not make a statement of that kind. There is a difference in them, all the difference in the world between my trademark and the Coca-Cola trademark, they do not look alike and are not spelled anything alike. I do not remember the conversation there. I may have visited Crossups Pharmacy on Clark and Van Buren Streets on those [1148] dates, April 9th, 1913, if I was there, and when I

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was there, I was calling on all of them. I called on Rodgers and Diamond's Drug Store in the Grand Pacific Hotel. I called on him a dozen times while up there. I do not think I ever did see the manager. If I did I would probably have sold him a barrel of Koke. I never did sell him. I do not remember mentioning the difference in the price of Dope and Koke and Coca-Cola. I do not know whether I compared my price with your price, or the price of Coca-Cola or not. In a way it may have come up, after I exhibited my sample at the drug-store the proprietor, whoever did the buying may have said, "Mayfield I think you have a better piece of goods than the Coca-Cola Company have got." He may have said you want less money for this than they do for theirs. We got less money than the Coca-Cola Company. My goods have practically been a dollar a gallon, all the time. If he comes in and asks for a Koke or a Dope or asks for a shot in the arm, he could give him my goods the same as you could Coca-Cola. I may have made the statement that the way this Koke can be sold easy is that most of the people at soda-fountains ask for a drink of Koke or a shot or Dope and it is not selling or misrepresenting Coca-Cola to give Koke. I do not remember it, but if I had I would have been justified in making it. I do not remember making the statement in those words. I do not know as I made substantially a statement like that. I did not on April 12th, 1913, at Chicago, Illinois, shortly after 11:20 A. M. Meet a gentleman, Mr. Warble by name, and during the

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course of conversation say to him "I can earn \$1,000 a month if I could work—if I would work every day," nor told that gentleman that I would give him 20 per cent, commission if he would sell Koke, and that no one could stop him for selling it as Coca-Cola. I did not make any statement that he could sell Koke for Coca-Cola, I may have made the statement to him that I could make that much money. I will deny making that statement. I do not know whether it was on that date or not, but I won't deny that while [1149] I was up there in 1913, to making the statement to him that he could sell so much Koke there a month, made the proposition offering him 20 per cent. I never did say that no one could stop him from selling it as Coca-Cola. I do not remember ever making a statement to that man, that if this man wanted the agency for the syrup, this Koke he could sell it and bill it as Coca-Cola, and nothing would happen to him, as I knew we had the Coca-Cola people there uneasy. I do not remember the occasion that I said my stuff was the same as Coca-Cola. When I go in to sell my goods, I give them a sample and they taste it and quite often, almost as a whole, he will tell me it is better. I cannot remember the different lines of talk I put up to the different soda-fountain people. I do not make the statement that we could not ship Koke as Coca-Cola, as it comes from another state, but the Koke Company intends to open an office here, in Chicago, and would make the syrup. I do not remember that the dealer tried a glass of our product and said he could not

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taste any difference between that and Coca-Cola and said he had a gallon of Koke—of Coca-Cola on hand, and that if I would come around June 1st, that is 1913, "I will give you an order for some Koke." I cannot remember what I told those dispensers and proprietors. I never sold goods with the same line of talk to any two men. I called in the Postal Telegraph Building on that party. I do not remember what date it was and I do not remember the conversation I used with him. I always had my samples, and Koke bottle. I do not remember anything of it. I do not remember making the statement that eight out of ten customers when ordering Coca-Cola ask for Koke. I do not remember what his conversation was now. I do not remember whether I gave that man a cigar at that time or not. I do not remember what I gave, whether I gave any of those circulars to anybody up there, and if I had some I certainly gave them some, anything that helped me in the way of making a sale, that was straight and legitimate. I do not think I had anything but a Pemberton certificate. [1150] I think at that time we had that printed on a bigger piece than Exhibit 19 on a bigger job, it was on cardboard. If I had one of them and had them with me at that time, and I often have had them, I gave him one. I may have told them up there at that time, when I was in Chicago, and getting ready for the organization, that if it was, and as we sold on a co-operative profit-sharing plan, that we would give them some stock in our company for the amount of goods they

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used. I do not know whether I told them how much, or what proportion of stock I would give them. I did not make any statement on June 7th, 1913, at Chicago, Illinois that I had sold seventeen barrels of Koke to the Fair Department Store, Siegel & Company, Whiteside and River Amusement Parks. I think I sold the Amusement Company some stuff. I do not think I sold them seventeen barrels. I might have made a statement that I had placed orders on that date and orders a few days prior or after that, that I had placed ten barrels approximately. (Exhibit 170) that is my certificate, we mail it and hand it out all over the country. Nobody ever took me to be working for the Coca-Cola Company. I think I was in New Orleans during the summer of 1912. I think I was in New Orleans about sixty days. I do not remember calling at the place of business of a Mr. George Jacobs, in connection with the Pittsburg Glass Company, in regard to paints, or telling that gentleman at that time that the Coca-Cola Company was suing the Koke Companies, or use the word they and that I wished him to testify that he had never sold our companies anything but common red *paid*. I may have seen a representative of the Pittsburg Plate Glass Company. I do not remember anybody by that name. I do not remember him at all. Roanoke is my first recollection of being any place in the world. I was there until I was five years old. The first place I ever attended school was at Atlanta. I went to the public schools in Atlanta, if I recollect straight, we were living on Ormond

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Street, I think. They called it the Ormond Street School, either there or when we lived out at Grants Park, I have a faint recollection of some school there. When I arrived in Birmingham, Alabama, [1151] I think we lived up over the factory, down at 2112 Morris Avenue. I lived over the factory when it was on Twentieth Street. Later on in years we had a home out on the Idlewild car line, and again on 29th and H. Street. I remember about the business on Morris Avenue. I do not remember whether we were rectifying any spirits over there on Morris Avenue. I think we rectified some on 20th Street. None of us were ever arrested for selling intoxicating liquors to my knowledge. I was never arrested for selling any booze. If we did any rectifying we had rectifier's license from the government. I think there was a sign tacked over the back door "Rectifying of Spirits." My father was not fined \$100 for rectifying or selling without a state, city or county license, to my knowledge. If anything like that ever happened I was not there or knew anything about it. I have heard of Koke all my life. I heard of it over in Birmingham at the time I arrived there, fourteen years of age. The first time I have any recollection about my father's business was 1890. I have a slight recollection of father's business in Atlanta. The place of business was down below the Trinity Church. I do not remember the name of the Street, down the hill. I do not know how those streets run. I could not even say the name of my father's business at that time. I do not know

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if anybody was with him at all. I do not remember whether my father had a license to do business in Atlanta at that time. I was nothing but a kid. I have nothing but a faint recollection of my father's business until I went to Birmingham, Alabama. I can remember of that place where he manufactured syrup and I can remember his office up in a big building, I think it was up on Marietta Street. I think it was in the Norcross Building. He manufactured Cola syrup, practically the same thing he is manufacturing now. I do not remember what he called it but I can remember a lot of Koke. I think I do in some manner remember Wine of Coca. I do not remember Celery-Cola. I do not remember anything about Indian Queen Hair Dye, nor Globe Flower Cough Syrup, I was too young. I can remember, a faint recollection of how the interior [1152] of the place looked, I mean what was in there, the reason I remember it was because he always had big boxes of brown—and barrels too, barrels of sugar. At that time they had tickets and I used to steal those tickets and go out and trade them for ice-creams, and these other iced drinks. I would not get Koke with them, the druggist would let me have anything. I think those tickets had on them, Koke. My father got out tickets for Koke which I exchanged for ice-cream. I do not remember where I made that exchange, one place was on the other side of the railroad where this Brown & Willis is now. I think it was a drug-store, I do not remember who it was. I do not know what was on the tickets

(Deposition of J. W. Mayfield.)

besides Koke, it was good for a nickel's worth of trade. That is what it was good for, complimentary ticket, good for a glass of Koke. My father used to have those tickets and I would go and take them and exchange them for ice-cream. I drank Koke when down at the office. I may have drank Koke in exchange for these tickets. I was not in Atlanta all that time, 1890-99. It is a faint recollection about anything over there at all, that and where the office was in the Norcross Building, and getting this brown sugar they had down there and getting these tickets, is about all I do know. I think at that time there was a Wine of Coca, there too, I do not know whether he was interested in it or not. I do not know whether I would recognize one of those cards or not. Those cards were about an inch and a half wide. It is all very faint, I do not remember very much about them. It had Koke on it. I think it was printed. I do not remember whether the Pemberton Medicine Company's name was on it or not. I have just an idea about getting ice-cream for them. I do not remember the manner of the printing of Koke on it. I remember about going to Birmingham in 1898 or along there. The business had been opened when I went over there, father had just gotten started. I do not know what was the name of his business, how he styled himself. I was about fourteen. It was not a vinegar business, it come in later. I remember the Schuyler and Gregory Vinegar Company, too, it seems. That company [1153] was not connected with my father. My father was

/(Deposition of J. W. Mayfield.)

up-stairs. He had a big kettle upstairs and a big tank downstairs and he made the stuff out of the tank, and let it run in a tank downstairs. He was shipping syrups and extracts. He was shipping containers, jugs and kegs. It was Koke and Celery-Cola. That was the first I ever heard of Celery-Cola, that was about 1899, also Pepsi-Nola. I do not remember anything else, I do not recollect of anything else. I think that was all. About that time though he installed a bottling plant. We installed it ourselves. We bottled Celery-Cola, Koke and Pepsi-Nola. That was the old Hutcheson bottle. They had a Koke label on the bottle. A star-shaped label, similar to the one they use now, I mean about the same size. Q. 291. You mean diamond-shaped? A. Yes, sir. I think they have on it "Delicious, Refreshing Koke" "Good for Fatigue, or Relieves Fatigue." It was not the type as shown on this #19, just printed in regular printers' type. We used all kinds of barrels, all they bought, they would *paid* them red or I would paint them red. I painted them red myself, all we used. I was actively in the business then. Outside of myself and my father I do not remember anyone else down there except Britton. I do not remember his initials. I think Mr. Britton was the bookkeeper. I think a stenographer was around there. I do not know her name. The only person I remember was Britton, my father and myself. I have not the least idea where Britton is. I have not seen him recently, nor the stenographer. At that time, I think it was Mayfield

(Deposition of J. W. Mayfield.)

Manufacturing Company, J. C. Mayfield Manufacturing Company. It stayed in business up until 1903, or '04. My father continued the same business. Part of the time he ran under the name of Schuyler Vinegar Company. I do not know whether the J. C. Mayfield Manufacturing Company ceased to do business or not. Up in 1904, I think it was known as the J. C. Mayfield Manufacturing Company in Nashville, and in Birmingham I think Schuyler Vinegar Company. I think it was known as J. C. Mayfield Manufacturing Company in Birmingham about 1900, I do not know how long. After the J. C. Mayfield Manufacturing Company had ceased to do business we used the name Celery-Cola Company, I think. During [1154] the time the J. C. Mayfield Manufacturing Company was doing business there, they were making Koke and Celery-Cola and Pepsi-Nola and a general line of extracts, that is soda-water extracts. I do not think they were handling any spirits there at that time under the name of J. C. Mayfield Manufacturing Company. That business was located at the time it was known under the name of J. C. Mayfield Manufacturing Company down on Morris Avenue. The name of the business when located on 20th Street was the Celery-Cola Company, the Celery-Cola Company engaged in the manufacture of Celery-Cola, Koke, and sold extracts and ran a bottling works. The Koke was one of their products. I do not think anybody was interested in them. It was Celery-Cola Company, nobody but my father was connected with that

(Deposition of J. W. Mayfield.)

When we moved to 20th Street the name was changed from J. C. Mayfield Manufacturing Company, the Celery-Cola Company. There was a Celery-Cola Bottling Company. I do not know whether there was two or not, I was not an inside man. I was painted barrels and doing the mixing. At different intervals, when I come in off the road for awhile, I would go up and do that. The Celery-Cola Company continued to manufacture this product Koke on 20th Street. The Celery-Cola Company had stationery and things of that kind. I do not think they had on their stationery the drinks they were making. They did not have Koke to my recollection. Celery-Cola was put on there, they were trading under that name. Beside the name Celery-Cola Company, I do not remember there being anything else on them. They had shipping tags with Koke on them, and labels and advertising matter. The Celery-Cola Company stayed in business in Birmingham, up to about 1910. I was not with them up to about 1910. I have been running all over the country. I went to Atlanta along in 1900 or 1901. I stayed there about five or six months. I sold Koke and Celery-Cola there. I distinctly remember selling old man Harris down on Marietta Street. The name of that plant was Standard Bottling Plant. That is W. R. Harris. I think he is over there now. I remember selling a fellow down in the Norcross Building. I sold him Koke. I sold Harris Celery-Cola. I do [1155] not know the name of the man I sold the Koke to. He was one of the biggest

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druggists over there. He was running a big soda-fountain. I was in the Norcross Building, I mean out there at the end of the viaduct where the big bank building stands. The viaduct was not there then, you had to go down and over the railroad, that was in 1901 or '2, that I sold this drug-store in the Norcross Building. I remember selling him because I went down and took my extract down there in his basement and showed him how to make it. I remember selling him Koke. It was not Mr. Venable or Jacobs. I do not know whether it was Mr. Norcross. I think it began with a C. I am not positive but I think I put some stuff in with Wylie. His place of business was over on I think Whitehall. I sold him the same product, Koke extract. He made up the product himself. I delivered it to him in jugs. It did not have any label on it, for the simple reason it was shipped down in kegs, and a man would not buy over a gallon because a man could make 11 gallons of syrup and I would buy a jug for a nickle, wash it out and carry it around to him. The kegs had Koke on them. I made my headquarters at the Standard Bottling Company, I had a place where I mixed it there. It came from Nashville. Sometimes they would come by express. It would have to come by the Southern Express Company. I have not any receipts or anything showing it came by express during those times. I have not any labels, letter-heads, or anything with the name Koke on it, during those times. I did not keep my correspondence, that long, if I did I would have a carload. I did not

(Deposition of J. W. Mayfield.)

keep receipts, what did I want to keep it for. That is about all I can remember, I sold in Atlanta. I think I sold others but I am not positive that I did. I think I sold a man that ran a drug-store right up above where I sold this other party on Marietta Street over about the other viaduct. It is between Forsyth Street and the viaduct, Broad Street viaduct, right over on one of those corners. It is mighty near, it is not hardly directly across from the old Columbia Theater there. It is on Marietta [1156] and Broad, on the opposite corner. I do not remember the name. I sold him Koke. He had a drug-store and a soda-fountain. I cannot remember any other name. I cannot say positively that I sold to anyone else. This was the only business I was in. From Atlanta I went back to Nashville, Tennessee. My father had located at Nashville, Tennessee when I went back there. They had so many places of business in Nashville, back there I cannot remember. One was Diehl & Lord's one was on McLemore Street, right down at the Court House; one was in the back end of the Vanderbilt Building and another was on Front Street. He was selling Celery-Cola, Koke extracts, and syrups. I have no label, or anything that has Koke on. During that time all the labels we had, we had no use for them to keep them, we sent out to the trade. That stationery was either used up or, I have not got any. I do not know that anybody has got any. I guess a lot of the old trade has some if they keep their correspondence. No one connected with the

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Southern Koke Company has, to my knowledge, I do not know whether my father has or not. We were not connected with any bottling business there at all in Nashville. I do not know whether my father had been connected with any bottling business or not. I do not know as he was president of any bottling Company. I remember a concern known as Tennessee Carbonating and Supply Company. My father was not connected with that, to my knowledge. I do not know if he was vice-president of it. We sold them extract, Celery-Cola extract. We did not sell them Koke. They bottled Celery-Cola extract and Pepsi-Nola too, two pieces of goods we sold. We were shipping Koke all over the country at that time. They were bottling it throughout the Carolinas, down in Georgia, and down in Florida. I cannot remember the customers. I did not get out in all that big territory, my brother did that. He was older than I was and he made most of these trips. [1157]

Q. 458. Will you name one person you called on, one bottler who bottled Koke during the time you were at Birmingham or Nashville with these different concerns?

A. That is too long ago, I cannot remember.

Q. 459. You cannot remember a single one?

A. No, I cannot. When I was at Nashville, Tennessee, I remember going down to a bottler [1158] down at Lebanon, Tennessee, I do not remember his name. I sold him Koke and he bottled Koke. That was in 1902 or '3. We had very few bottlers bot-

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tling Koke, we were specializing to the bottler Celery-Cola, Koke was almost exclusively used at the soda-fountains. I sold a couple soda-fountain people at Lebanon. I do not remember any man's name, that far back. I do not remember the name of any one I sold to in Nashville. There was one place I sold up at Murfreesboro, North Carolina, he was a bottler, I think. I do not remember whether at the time he had a bottling works and business located in Murfreesboro. That was along in 1902, I think. It was Murfreesboro, North Carolina, it was either Murfreesboro, that was the man's name or something like that, and if it was not there it was right above there at Goldsboro or Salisbury, I think we had a bottler at almost every one of those places. I am almost positive it was Koke they bought. I would not swear it was Koke, and not Celery-Cola, I do not think it was Celery-Cola, but think it was Koke. I do not know who they were, these bottlers. I know that I went up there. I remember all kinds of mail orders coming in for it. I do not remember the names. I remember in Nashville there was Freed & Haas and Diehl & Lord and Dorider & Sidebottom and I think Sann or Samm. I do not know his initials. I think he is still in business. I think Demoble handled some in Nashville. A party out at the park used to handle it. I do not remember who he was. There was a bunch of them down at Birmingham using the bottled goods. I cannot recall their names. I cannot remember the names of any other than those named, but if I should go to

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that town I could go right to their place of business if it is in the same place as when I went there, and if I sold the man I could come near calling his name, if I did not I could know him when I saw him. I could do that in Cincinnati, in fact I could do that in practically any town of any size east of the Mississippi River. I have been in all the towns of any size east of the Mississippi River, as far up as New York, and as far south as Miami. I have been talking about [1159] the product Koke, except where I have specified Celery-Cola or where you have specified Celery-Cola. There was some people down in Florida Groves handled it. McGraw at Cadsden. I do not remember Baker at Newman, Georgia. Since the institution of these suits, if we could find the names and parties we did business with back there, we searched for them so we could use them. I have not found out any names. Those names are some I happened to remember. I have very little to do with the inside work. I looked for them down in Florida and the territory I have been working. There is one man at Daytona. His name is Hankle, I think, at Daytona, Florida, I think it was. He was a druggist down there, he is still a druggist. I never did sell him personally myself, but he handled my goods back twelve or fourteen years ago. I think he is now at Daytona, Florida. I was told by one of the soda-men who was with him that he handled Koke back that far, by a fellow named Sam Dunlap. He is at Jacksonville. He is in business for himself. He remembers that Hankle handled

(Deposition of J. W. Mayfield.)

Koke. He handles it now. I stayed in Nashville, up until about the latter part of 1902 or first of 1903. I went to Saint Louis. I opened up a laboratory there. Brittain was in charge of that laboratory. I think Mr. Brittain is dead. That laboratory located in Saint Louis was at 18 Olive. We were making Koke there. The name of the concern up there was Mayfield Manufacturing Company. I was not connected with the Celery-Cola Bottling Company up there at that time, the J. C. Mayfield Manufacturing Company owned the bottling plant. I do not think Celery-Cola was bottled there. I do not think there was two companies. There was not a Celery-Cola Bottling Company there at that time. It started after the fair, I think. Up to that time my father practically owned it and then sold out. I do not remember who he sold to. The Celery-Cola Company bottled Celery-Cola and a general line of flavors. Whether they bottled Koke, I do not know. I left about that time. There was a bottling plant owned by the J. C. Mayfield Manufacturing Company. They bottled Celery-Cola. They did not bottle Koke, that was in Saint [1160] Louis. I sold goods there. I had charge of the Suburban Park Stand. I was in charge out there almost exclusively. I don't know whether it was owned by them or leased by them. I was manufacturing Celery-Cola there. It was a soda-fountain operated by the J. C. Mayfield Manufacturing Company. I had charge of it. We manufactured Celery-Cola, Koke and several others. There was a little difference be-

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tween Celery-Cola and Koke. Celery-Cola had a little bit of Celery in it. We made up some of the syrups at Saint Louis. I was in charge of the laboratory. We made up Koke and Celery-Cola. We would usually take the ratio of 12 pounds of sugar to a gallon of water and dissolve it. My father did the manufacturing of the extract. I manufactured the syrup from the extract. I made both syrups. I made them at different times. The only difference was Celery-Cola had a little celery in it. I had nothing to do with the sales at St. Louis. I was operating the soda-fountain at Suburban Park and later the soda-fountain at the office. They had an office at Birmingham and in Nashville. My father was in Nashville with me very seldom. He was in Nashville most of the time. A fellow by the name of Fox was in charge of the Birmingham office. I do not know his initials. Rice, the name is familiar but I do not recall that he was employed at the Birmingham place. I was up in Saint Louis. While I was in Birmingham, we had three or four young chaps there about the plant. I do not remember their names, and old man Garret was there, a bookkeeper. I do not remember his initials. That is about all I can recall; of course, they were coming and going all the time. You cannot keep the same employees all the time. This man Brittain was the same man that was at Saint Louis. I have not the least idea where Garret is now. After I left Saint Louis, I went back to Birmingham and stayed a year or so. The Celery-Cola Company was operating

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down there, manufacturing Koke. The employees of the Celery-Cola Company were the same crowd. We had a salesman there by the name of Benjamin. I do not know his initials; [1161] I guess he still lives up there in Birmingham. I have not seen old man Benjamin in fifteen years. Celery-Cola Company, J. C. Mayfield Manufacturing Company and Schuyler Vinegar Company, that is all the companies. When I went back to Birmingham I made a business trip to Georgia, Alabama and Florida. Old man Groves had been *handling* a long time before then. I do not remember who else I did sell on that trip. I cannot remember, working all over the country, and meeting fifteen or twenty different merchants a day, I cannot recall the names. I sold a bottler over there at Savannah. I sold him Koke. His place was located, if I was over there I would walk right up to the place. I do not know how the town lays. I do not remember his name, nor the street he was on. I have been inside the plant. I do not remember what kind of machinery he had. That was in 1905 or '6. The boat I went up on was City of Savannah—City of something, they have City of Savannah and City of Macon and City of Memphis. I went to Atlantic City. I sold it at Atlantic City. I sold to the biggest soda-fountain in the world, at that time, the White Rock Company. They are still in business up there. I sold the White Rock Company Koke. They have their water on the market still. They were advertising White Rock and I went down there and took a position just to

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get my stuff on the fountain, took charge of the fountain. After I left Atlantic City I was in New York and worked in lots of different places. I sold Koke up there. I worked in soda-fountains from 132d Street to the Battery. I do not remember the names of the places. After I left New York I stayed in Birmingham, and then went to Dallas, Texas, and stayed six or seven months, and had an office and laboratory at Dallas. That office and laboratory was located up on Main or Elm, on one of those streets. I was doing business with the Celery-Cola Company, we were selling Koke and Celery-Cola, that was all. Most of the stuff came from Birmingham, I had some out there. I filled orders at that office, mail orders mostly. We were shipping goods all over Oklahoma and all over Texas; I cannot remember the names. I made a trip up through Oklahoma, just a selling trip, and then my [1162] health got bad and I came back to Birmingham. I did not stay in Birmingham any length of time, then. The Celery-Cola Company was doing business there at that time. From there I went to Richmond and stayed six or seven months, and opened an office at that place, down on Broad and 12th Streets. The name of the Company was Celery-Cola Company. I did not take out license, that I know of, at those places. I do not think they required a city license. I did not take them out to my knowledge. We did business with a number of people there. I cannot remember the names. We done business all over the two Virginias, Carolinas

(Deposition of J. W. Mayfield.)

and up in Maryland. We were selling more Celery-Cola in our business with the bottlers. Koke went best with the soda-fountains. We did not have very much money for advertising so we could not push both, and Celery-Cola being a bottling syrup, being bottled all over the country, they would have all the advertising. Advertising of the Koke syrup *out*, that was known the best. I do not know where I got the advertisement. I have no correspondence from Richmond. I do not know whether I can get any correspondence over five or six months old, if I could get it from my customers. Then I went to Indianapolis from Richmond. I placed it through a jobber. I do not remember who he was. I sold hundreds throughout Indiana, Ohio and Michigan but I do not remember them. I remember selling Celery-Cola to Moore Brothers at Toledo, O. P. Clee at Milltown, Dayton, and I sold Koke syrup to quite a few people at Cincinnati. I cannot recall where they are. One is in the Arcade; a Greek also has a place over on the square. That was when I had my office at Indianapolis, about '8 or '9. Up there all I was doing was taking the orders. If I had some of the old order books I could reel them off. I have not any of my old order books. They are gone. What do you want to take a dead issue around with you for? I was in Dallas. I was at Houston, opened an office in Houston. I mean, not an office but a laboratory, in an old bottler's there. I do not remember the Jew's name, a great big bottler up there near the railroad track in the city. When I [1163]

(Deposition of J. W. Mayfield.)

went out there he was bottling Coca and Cola and then I got him to put in Koke. I cannot give his address. Out of Houston and Dallas, I did business all over the state. I cannot remember the names, I called on so many people in the territory, meeting people there, I cannot remember the names. I can recall the places but I cannot recall the names, and then I went to the east coast, Carolinas and Virginias, traveling selling Koke. This was along in 1910 when I was in Dallas, 1911, when I was there. 1910 I was with that Jew bottler in Houston. I was there about a year. I do not even know the railroad this bottling works was situated on. I remember another bottler handling my stuff, Koke; I do not remember his name. Both of these bottlers handled Koke, about four years ago. Within the last year or two years I sold to Albright & Wood, of Mobile, Sutton Brothers, Central Pharmacy in Mobile. A fellow named Davis over there, that is all I can remember there. I sold some down in Pensacola; I sold the Busy Bee, the Bloodwine Bottling Works—not Bloodwine, the Brainol Bottling Company, the De Funiak Springs Bottler, B. Merk. I made every town in Florida. I do not like to mention all my customers. I do not want to mention my customers, I can reel them off. You have got them all down there scared to death on this litigation as it is. I bought these bottles I produced and testified to here. I do not know whether they are all I got or not. I think I got some more. I got Mi-Coca, Rye-Ola, Wise-Ola, Pepsi-Cola, Brainol and Gay-Ola. I do

(Deposition of J. W. Mayfield.)

not remember of any more. I got Coca-Cola. I did not present them, that was not the kind of evidence I wanted. I knew that Coca-Cola, and everyone else knows that some Coca-Cola is sold on calls for Koke and Dope. [1164]

Deposition of John F. Williams, for Defendants.

JOHN F. WILLIAMS, a witness produced on behalf of the defendants.

Direct Examination.

I am forty-five years of age, I live in New Orleans. I am engaged in the business of printing. I printed the label on the bottle filed in this cause as Defendants' Exhibit #38. I printed two hundred thousand of them. In October, 1913, was the first labels I had printed for him. It cost \$36.00 to have those printed. Mr. J. C. Mayfield Sr., furnished the cut, and I sent the labels to him after I made them. About his place of business on Howard Ave.,—608, I think. Mr. Mayfield furnished the cuts. The cuts came from the New Orleans Engraving Co., he gave us the order for the labels and he may possibly have asked my advice about the colors. That has been a year and a half ago. This was a new label never used before.

Cross-examination.

Those labels were made by me in October, 1913. I do not remember whether or not Mr. Mayfield brought me a sample of an old label that had been used before that. He made a contract for the work and the labels were brought to me by the engraving

(Deposition of John F. Williams.)

company, by the New Orleans engraving company. They were new cuts. I had not known Mr. Mayfield very long before this October, 1913. I had known of the company probably a year, here in New Orleans. I did not have any business dealings with them, I tried to. The people that had charge of it previous to that time were friends of mine and I tried to get the work, tried very hard but I did not get it. They have a good deal of work. I have done other work for them, stationery, order blanks, price lists, circulars. This order of October, 1913, was about the first, since then I have been printing order blanks and stationery.

Deposition of William Dalton, for Defendants.

WILLIAM DALTON, a witness on behalf of the defendants.

Direct Examination.

I have lived in New Orleans a little over four years, in the insurance business. Before that I lived in Texas, Sanford, Jones County, principally. I am now manager of the Accident and Health Insurance Company. I am fifty-two years of age. I was connected with the Southern Koke Company, Limited of New Orleans. I would not be in a position to tell you about [1165] the date, but I was connected with them for three months, about three months and I think along about May, June, July. I left the Koke Co., and was gone about two weeks on a trip, to Denver. I do not remember just what date it was but it was somewhere about the

(Deposition of William Dalton.)

11th or 12th of July I imagine, when I went to Denver, Colo. I was Manager of the Southern Koke Co., Limited. I knew Mr. Scott, he was still connected with the Company when I was there the first time. Mr. Scott is now dead, he was killed very suddenly and I returned to New Orleans just about the time or just subsequent to his death, I cannot recall the date of his death and I cannot recall the time that I came back from a trip to McKinney, but Mr. Scott was dead when I took hold as manager there. I met Mr. Scott some two or three months before I took hold of it and that was one of my conversations with him in a general way. I knew C. W. Whittle, he was an ex-saloon-keeper or bar-tender. He never sold Koke for the Southern Koke Co., under my administration. He was never employed by the Southern Koke Company to my knowledge. Somebody was foolish enough to sell him one or two shares, I have forgotten how much, of stock in the company, I bought them back from him. I paid him back for the stock, what he paid for it. I do not remember how much it was but I gave him what the stock was worth, I am not sure—I do not remember what he had one share or five shares. He came to me and wanted to sell it and I took it out of his hands for the reason that I did not think he was a man that ought to have it anyway, on general principles. I know very little about him. He was a bartender and lost his job and I would not consider him a fit subject to represent the Koke Company either. I used to know a man

(Deposition of William Dalton.)

by the name of Cheever who was with the Koke Company in some capacity, I think he was when I went there. I think he was fired about the time or shortly after I went there. Neither the Koke Company nor myself nor anyone connected with the Koke Company, so far as I know got Cheevers nor employed Cheevers to sell stock in the Southern Koke Company. Cheevers was in some manner connected with Mr. Scott. They used to go around together. Scott did not live with his wife but was at Mr. Cheevers home in some inside semi-social arrangement [1166] between them that I do not know much about. During the time I was connected with the Koke Company as manager, I never instructed any of our salesmen, or hear any of them instructed by anybody to attempt to sell Koke as and for Coca-Cola, or advise their customers they could do so. None of our salesmen, Cheevers nor Whittle nor anybody else told me that they had been telling the dealers and the customers that they could easily palm off Koke for Coca-Cola. The matter was never under discussion to my knowledge, and no instructions were given during the time I was associated with the company in any manner, toward using Koke as a substitute for any other drink. The Southern Koke Company, Limited during my connection with it, neither through me as manager nor thru any of its agents so far as I know, never in any manner attempted to palm off Koke for Coca-Cola. I heard Mr. Mayfield distinctly tell them not to do anything of that kind. There were some

(Deposition of William Dalton.)

gentlemen called on me, that gentleman is the one (indicating Mr. H. B. Pierce). Mr. Pierce over there, the detective for the Coca-Cola Company.

Mr. HIRSCH.—I object to that, there is no evidence in here that Mr. Pierce is a detective for the Coca-Cola Company at all.

He did not tell me he was a detective for the Coca-Cola Co., but Mr. Freeman and Mr. Pierce called on me at one occasion in my office, I do not know that they said it was anything about two detectives. He told me that he was a representative of the Coca-Cola Co.

Cross-examination.

I do not remember when Mr. Freeman and Mr. Pierce called on me. I had no reason to make a note of the date. I would not dispute the date for I do not know. It was during the time I occupied the office in the Hennan Building. I know Mr. Wright. At the time Mr. Freeman and Mr. Pierce called on me they wanted me to go to the stand and make affidavit to the effect that the Southern Koke Co., Limited was substituting a drink, which by virtue of its similarity to Coca-Cola—they were having me give a deposition if I was able, to the effect that it was virtually the same. I told the gentlemen I could not do anything for them. I did not pledge these gentlemen to secrecy about what I did tell them. I told [1167] them this, we had a conversation of an hour or so, pardon me if I am a little bothered. I say an hour, two hours, do you want the whole detail. In the first place I am here

(Deposition of William Dalton.)

against my will, in the second place I am engaged in a business that I did not want to become identified with any lawsuits for the reason I was before the public in another proposition of my own, that I did not want the slightest reflection cast upon, which in other words I was fitting myself for the position of manager and assistant secretary of the company. I now hold that position. The reason of my secrecy was to keep me out of the public limelight. I did not want to get in touch with a public lawsuit. I am here against my will because I am engaged to be somewhere else. If you want to keep me behind time, I am engaged at 7 o'clock to be down town. I live at 74 Peters Ave. I did not want to come.

Mr. LITTLETON.—There is a subpoena out for him but I got him over the 'phone. Mr. Pierce and Mr. Freeman called upon me and tried to get me to advise with them so as to enable the Coca-Cola Company to successfully win a suit against Mr. Mayfield's company. I told them I did not want to be connected with or associated with it. I wanted to keep away from any connection whereby I might be brought into the public limelight; they also wanted to know whether I would say things that I could not say. I was associated with the Southern Koke Company, Limited, as sales-manager. I sold some stock for them. I was manager for the company. My position as general manager for the Koke Co., was donated to me by the President of the company, Mr. Wright. I held it for a short

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time, two months or more, maybe three months I do not remember exactly. In August, 1913, I severed my entire connection with the Southern Koke Co. When I severed my connection with the Southern Koke Co., Limited, Mr. Mayfield on my severance agreed to pay me in cash for all the stock I had sold for myself and friends, I did not say at that time that J. C. Mayfield claimed to own one-fourth interest in the formula of Coca-Cola, for I did not know. Nor did I say that the extract being made by Van Dusen of St. Louis, Mo., is from the formula of Coca-Cola. Those were questions practically propounded to me, I did not say any part. In other words I am trying to find out what you said. I understand you, the point that you are passing that thing as being in my [1168] statement is not so. The Southern Koke Company, Limited, of New Orleans purchased this extract from the Koke Company of America, under a contract. That is my understanding of the contract, I had and it was also told me as near as I can remember, or words to that effect by Mr. Pierce if I got the name right, Mr. Pierce, that the Southern Koke Co., Limited, did not manufacture the syrup they used, but were compelled to use the extract manufactured by Van Dusen of St. Louis, Mo., to make this syrup by addition of simple syrup and water. No, that is a question that was asked I do not know one part of that secret formula. I presume you or I do not know anything about it, but I did not make that statement, those are rather lead-

(Deposition of William Dalton.)

ing questions. I do not know whether—if I had brought the copy of the questions propounded to me and sent to me thru Mr. Freeman, I would have been able to verify them, but those were the questions put to me whether I could substantiate them. These quotations came from this gentleman, or some lawyer, or gentleman thru Mr. Freeman, I presume they were left in my office when I was out, I did not say that the Koke Co., of America does not manufacture the syrup to sell to the subsidiary co., never had been selling those companies syrup but manufactured an extract made by Van Dusen of St. Louis, Mo. I did not say that the method used to market the Koke to the retail trade by the Southern Koke Co., as per instructions of the Koke Co., management, and as instructed by yourself during the time of your management was as follows: That the salesman was to approach the retail dealer and inquire of him how much Coca-Cola he sold a year. I told Mr. Pierce in the conversation that I personally had gone into a drug-store in the city of New Orleans and made that inquiry on my own account. The agents were not given any instructions to that effect. I told Mr. Pierce I personally went into a drug-store in the City of New Orleans and asked how much Coca-Cola had been used by that institution, and he told me. I told Mr. Pierce that that was my statement, and not what I told my company's men, employed by us while I was connected with that company. The instructions to the men were to go out and sell the Southern Koke Co.,

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Ltd., product wherever and whenever they could to customers that would be absolutely able to pay their bills. That is his [1169] instructions, the salesman would sell the goods. I did not tell the salesmen to say we have a product that is the same as Coca-Cola, neither were the salesmen allowed to make the statements. They were told positively to keep out of the way of Coca-Cola, to boost us and sell the stuff, that the best way to sell the stuff was to sell it on its own merits, not on someone else's, and that applies to the time before I went there. To the best of my knowledge the only difference is the name and we sell this product Koke at a much cheaper price than Coca-Cola. No instructions of that kind were given to me or by me or thru me to any one of the salesmen, to defy the public to tell the difference between Coca-Cola and Koke when carbonated water has been added. (Reading from Statement:) "Now, if you will give me an order for half of your Coca-Cola business for the year you can save a lot of money," not one of my agents had any instructions at the time I was with them. (Continuing reading statement.) "That you have a large number of customers who ask for Koke." To Mr. Pierce or Mr. Freeman I am not clear as to whether I did or did not say that, I think I figured with Mr. Pierce that if I had been connected with them I could have used it to good advantage, is that not so Mr. Pierce?

Mr. PIERCE.—I am not on the witness-stand. That is right I had forgotten, I am on the stand, you

(Deposition of William Dalton.)

know I want to get to the bottom of this. Now, Mr. Dalton, instead of my reading this to you I hand it to you, a sheet—two sheets of paper which we call exhibit #20 and ask you to just read over, that purports to be a conversation between yourself and Mr. Pierce and Mr. Freeman; you take that and read it over and take a pencil and strike out everything there that you did not say to this gentleman.

Mr. LITTLETON.—We object to that form of examination and advise the witness not to do any such a foolish thing as that. I cannot do that, I am prepared to go over and verify word for word what I may have said to Mr. Pierce informally. He represented to me that he was the Coca-Cola's agent and wanted information. All I can tell you is that I had not anything that I could give him that would benefit him. (Reading from statement:) "That you had a large number of customers who want Coca-Cola when [1170] they ask for Koke, and that you can serve this product." No, sir. "That the salesman then went on to inform the dealer of the stock proposition, offered by the Southern Koke Co., to retail dealers." I said that the salesman had some right to tender a certain amount of—I have forgotten whether it is common stock, based upon a certain production or certain sales of Koke of Southern Koke Co., drinks, but that matter was not discussed between the salesman and myself, it was an arrangement previously entered into which I did not change. "That, if the dealer stated that when the term Koke was used by the customer,

(Deposition of William Dalton.)

when the customer wanted Coca-Cola, that the salesman should reply well, it is not your business to know what a customer wanted, if customer wanted Coca-Cola and called for Koke the dealer had every right to give such customer the product of the Southern Koke Co., as the customer asked for Koke. That was propounded to me by Mr. Pierce and Mr. Freeman. That is not part of what I said to them. They wanted me to acquiesce to it but it was not so and I did not. Coca-Cola is not the same drink in every respect. I was asked to affirm if that was so but I could not. I did not say that Koke was a long established and universally used nickname for Coca-Cola. I said it was back of me. I said probably it was and probably it was not. I did not say "It was universally understood by retail dealers and consumers, but outside of New Orleans, Louisiana you did not know where the product as advertised, but that every shipment of Koke syrup, had advertising matter sent with it and furnished several places in New Orleans, you did not know where this advertising was used or displayed." How could I know it was a nickname. Koke was a drink and was sold. I have heard Dope. I did not have any impression of Koke or Dope we simply sold ours as Koke. I was an insurance man before July, 1913. We used Dope in our business right along and all this stuff will be Dope when you get through with it. I believe my personal information is that all that stuff goes under a common name of Dope or Koke, all those drinks, under different

(Deposition of William Dalton.)

names, I do not think Coca-Cola is anything else but Coca-Cola, Koke is Koke, Gay-Ola is Gay-Ola. I severed my connection with the Southern Koke Co., because it was not a congenial business for me, it was outside [1171] of my line, I was not used to that class of business, that was the only reason I severed my connection. I think Mr. Freeman wanted me to make some statement relative to the deal in which I was induced to make the contract I had before I went there, they implied to me that the word was practically a copyright of the Coca-Cola people. I said I did not know whether it was or not, I do not know now. I think Mr. Pierce asked me if Mr. Mayfield took advantage of the fact that the term Koke was universally used for Coca-Cola. I could not tell you just what I answered, I did not answer but very little to Mr. Pierce. I did not state that the Coca-Cola company made a serious mistake when they permitted Mr. Mayfield to acquire the trademark Koke over their heads. I spent about two hours with Mr. Freeman and Mr. Pierce.

The WITNESS.—Now, there is one thing I want you to straighten out in that record, that I positively told Mr. Freeman and Mr. Pierce that I wanted to have no publicity. Mr. Pierce came to me and tried to have me—he said it had been stated to him that I was not very well satisfied with my connection with the Southern Koke Co., Ltd., I do not know where Mr. Pierce got the information, or ascertained the fact. I said well, probably so, but

(Deposition of William Dalton.)

there was nothing only the fact that I resigned for the reason that I was not congenial to that class of business. I am an insurance man and have been for years and I cannot go out and sell Koke, Dope, Coca-Cola, or Rye-Ola.

Deposition of W. J. Finnin, for Defendants.

W. J. FINNIN, a witness produced on behalf of the defendants.

Direct Examination.

I am thirty-three years of age; reside in New Orleans, and am engaged in the retail liquor business. I have got the sign out there, cafe, and from ten to twelve or twelve-thirty, it depends on how long the soup will last, some days it will last until one o'clock, some days it don't go until twelve, but I put up cold sandwiches, such as you order, such as sardines, ham, and I have got an Irish—another little herring, you put in between the bread and make sandwiches, the only hot lunch I have is soup, I have that to serve when you want something to drink. I dispense soft drinks at my place. I have white pop, at least not white [1172] it is creme soda, they call it, and sarsaparilla and celery tonic, put up by the World Bottling Co., ginger-ale put up by the World Bottling Co., and I made lemonade and seltzer water and I make up a drink they call Naco with just seltzer and ice. Naco is a syrup, you put a little in it, just like someone comes in and says a little raspberry syrup and seltzer and I think I have some of that Koke syrup made up the same way with seltzer and ice, just the syrup not in bot-

(Deposition of W. J. Finnin.)

bles. I get the Koke from the Southern Koke Co., I believe they call it to the best of my knowledge. Sometime back there was a young man asked me a few questions about the Coca-Cola Co., and the Koke people, he said do you handle Coca-Cola, I said I did not, I handle Koke syrup and Naco; he said if a man came in and asked for Coca-Cola would you pour out that and give it to him for Coca-Cola, I said no, I never misrepresent anything. I would tell him I have got the Koke syrup but I have not got Coca-Cola, and some of them will say I want a bottle of Coca-Cola and I have not got it. To the best of my knowledge, I think it was a Coca-Cola man. Cheevers has not sold me something in a long time. Mr. Scott died in May, 1913. After the old man Scott died Cheevers was not selling it any more and I never had anybody call on me but another man. Cheevers sold me this Koke. He said, I want to tell you something Bill, this is Koke. Just a Koke syrup and mix it up with ice water and seltzer. I knew Mr. Scott before Cheevers called on me. Mr. Scott called on me for months I guess, before I knew Scott was representing, or what his mission was or anything else, in fact he never did mention anything to me. I think this was Billy Cheevers, I do not know if he had a middle name or not. He never told me once that this syrup he was selling could be passed off as Coca-Cola, or tell me to pass it off as Coca-Cola. He just said this is Koke syrup, told me how to use it and demonstrated to me, said you put this much syrup in the

(Deposition of W. J. Finnin.)

glass and fill it up with ice and the more ice you use the less seltzer you have to use. Looked mighty good to me. My place of business is located at 625 Commercial place between Camp and San Carlos, right in the back of the Bakeman Bldg., in fact is in the rear end. Commercial Place is the proper name some [1173] people call it the Alley, I do not want to live in an alley or do business in an alley. I do not know a man by the name of C. H. Whittle, I might know him by sight but not by name, I do not think he sold Koke to me.

Cross-examination.

I have never heard of this Koke syrup until Mr. Cheevers sold it to me. That is the first time I ever heard of it, would not have handled it had it not been for Billy Cheevers, because I always handle creme soda, and black pop, and this Hemorasic syrup, and when a fellow comes in and asks for a soft drink I will usually take one or sell him a drink of ginger-ale and when he wants'a mixture, and says I don't like ginger-ale why it is ready. Some people call it raspberry, and raspberry is a darker color than Hemorasic, that is all the difference in them. Hemorasic is a fruit syrup lighter than raspberry, we use that for whisky punches and it does not tart like the raspberry does. I used to handle Coca-Cola, on calls for Koke I give Koke. I sold Coca-Cola when we had it. That was before Koke, because I could not see where little Willie was getting off at seventy cents a box for Coca-Cola when Koke was cheaper. Before I took this Koke syrup and

(Deposition of W. J. Finnin.)

was still selling Coca-Cola, I did not ever hear the terms Koke and Dope used. I will tell you what I did hear when I was selling Coca-Cola, I said to one of my customers I wonder how the dickens he liked so damn much of that stuff all day long; he said, "It has got good dope in it; it makes me feel good, revives me, I feel like sometimes I could go out and spend one hundred dollars when I have only five cents in my pocket." I said I have wondered all the time why you drink this stuff. "Gee," he says, "it puts me on the jump; all I have got now is what you gave me in change, twenty cents out of a quarter, and I feel like I have got one hundred dollars"; that is why he calls it dope; he never called it Koke, just dope. And just the one man, that customer, and I thought he was looking dopey all the time. No one called it that at all but this fellow and I don't know what became of him, he has disappeared; I have not seen him in some time, not that I say Koke made him disappear; I do not know what happened to him, but he is gone.

Deposition of J. C. Mayfield, Jr., for Defendants.

J. C. MAYFIELD, Jr., a witness produced on behalf of the defendants. [1174]

Direct Examination.

I am twenty-seven years of age; live in Chattanooga, Tennessee; a son of J. C. Mayfield. I was in Denver, Colorado, I think it was during 1907 and '8, no, 1908 and '9, I believe it was, I do not remember those dates; I think it was during 1907 and '8.

(Deposition of J. C. Mayfield, Jr.)

While I was there I sold Koke and Celery-Cola syrups in Denver, Colorado. I was out there, I guess, a year and a half or two years. I was selling these syrups for myself and my father. Subsequently I went to New Orleans, Louisiana, in 1912. When I got here we opened up the Southern Koke Co., Ltd., that is the present Southern Koke Co., Ltd., when we opened it up there was besides myself, W. McCarty Moore, and L. S. Scott. I purchased everything except the tank and electric motor and screws and bolts; I do not think I bought those, the screws to hold the different parts of the machinery together, when I went to place the order for the pulleys and cog wheels Mr. Scott went with me. J. W. or W. J. Cheevers did not go with me, this man Cheevers did not buy anything so far as I know. We make up this syrup by taking the extract or compound, whichever you call it, and mixing it with sugar, water and glycerine. The extract or compound is shipped from St. Louis, we just took the sugar, water, and glycerine and made the syrup and flavored it with this extract or compound. We never got a bottle of Coca-Cola to test the syrup we were making with. I never got a bottle of Coca-Cola syrup to test it with. I do not remember of ever buying any Coca-Cola syrup except at a soda-fountain to drink right there. I never told W. J. Cheevers that the contents of a whiskey bottle I had was Coca-Cola syrup. Once in awhile I would make a test of the syrup, I would get a fresh supply of compound from St. Louis and I would make up the

(Deposition of J. C. Mayfield, Jr.)

syrup and test that syrup with some old Koke syrup we had to see that it was standing up and was uniform. The first batch of syrup I made up here I did not test with anything; I did not have anything to test it with, I tasted it. A police officer never came to our place of business nor did I ever hand him a glass of Koke and a glass of Coca-Cola and ask him if he could tell the difference. There was a policeman in there. When we first opened up we hired two carpenters to fix the partition for the office and when that work was completed one of those [1175] carpenters got onto the police force and I knew him quite well and he was a privileged character around there and he would come in up there whenever he got ready and ask no one, sometimes he would come in the back door and go out that way and sometimes go to the front door and go out. Mr. Cheevers testified that I had a bottle of Coca-Cola syrup when they first opened up there, and on the following day, Scott made some of the syrup—that the Koke was not then ready, and they all drank Coca-Cola. I do not know anything about that; I was there all the time but I do not remember anything happening like that. If it had happened around there I would have remembered it. Cheevers initials were J. W. if I am not mistaken. I did not tell Cheevers I purchased the Coca-Cola for the purpose of testing. To my recollection he never said a word about Coca-Cola syrup; if he did I think I would have remembered it. I never in New Orleans tested the Koke syrup with Coca-Cola for the purpose of comparing it, or for

2 (Deposition of J. C. Mayfield, Jr.)

any other purpose. (A paper marked Defendants' Exhibit #55.) That is 100 yards of burlap at 15 cents a yard, fifteen dollars, that was to go around the walls of the office of the Southern Koke Co., Ltd., in New Orleans on Howard St. I purchased it. (A paper marked Defendants' Exhibit #No. 56.) It is an invoice receipt for supplies purchased for the Southern Koke Co., Ltd. I purchased those supplies December 16, 1912. No one went with me when I bought this. Defendants' Exhibit #57 is a receipt for supplies purchased; this covers bevel gears, shafts and pulleys; a receipt for the amount of money, \$28.40; Oscar Green is the negro driver. I gave him the cash for the job and he signed his name Oscar Green, the driver for Whitney Supply Co.; Scott and I went together; Cheevers did not accompany us. Those two vouchers, the three vouchers put in evidence, are the only machinery I bought, except the electric motor. Scott ordered it from out of town by mail. That was not purchased here in New Orleans. There was considerable delay in getting the motor here and he got some local electric co., and I went with him at the time, to give him one of their motors out of stock and they took this motor in transit to replace their motor. Cheevers did not accompany us on that trip. When we rented the quarters where the Southern Koke Co. [1176] located itself, Mr. Moore, Mr. Scott and myself went and looked at several places and decided on this particular place where we now are. We agreed among ourselves that that was the location, then Mr. Scott

(Deposition of J. C. Mayfield, Jr.)

left us and went down to the real estate office and signed notes covering the years rent on that property. Mr. Moore, Mr. Scott, and I went around to pick out a place of business; Cheevers did not accompany us, he was not connected with the Southern Koke Co. at that time. Later on he came in there, but not for two or three weeks after that. He did not have anything to do with the organization of the Co., or the purchasing of appliances, so far as I know. When Mr. Scott went around to sign the notes for the real estate, he left us to go up and do that and I do not know of anyone accompanying him. I know some paint men, but I do not remember M. D. Palmer. I do not remember the date, February 13, 1913, but the man came in and I bought five one-gallon cans from him; I told him I wanted the very cheapest red barn paint with a gloss to it; he sent me the paint. I painted several barrels with it; I guess I used a gallon, maybe a little more, of the paint before I noticed how they looked when they dried. They looked very unsatisfactory when they dried, looked as if they had been smeared with red, muddy water. It was quite a little while drying but I guess about as quick as the average paint would dry. It was about the same color I had been using, I guess, but a very dead and ugly color, there was no gloss; it would have been all right had there been a gloss to it. Later on he came up there and I told him what was the trouble, that I could not use it and, he agreed with me that it was a very ugly package. I do not think I told him it was not the right shade of paint.

(Deposition of J. C. Mayfield, Jr.)

I did not tell him I wanted the Coca-Cola shade as near as possible. I did not say anything to him about the color of Coca-Cola barrels; I do not think I did. I did not tell the man that I had theretofore been using a darker shade of paint, and I wanted to get away from it, to as near the Coca-Cola color as possible. The paint I was using was very satisfactory; prior to that time I bought paint from George Jacobs, on the corner of Howard and, I think, Baronne St.; the kind of paint was Aboroid, something like that, Ivoroid, I never ordered by the [1177] name I always ordered by the number, A-29. Defendants' Exhibit #58, dated April 9, 1913, on the billhead of George Jacobs, this covers three one-gallon cans of A-29 paint and some tacks and thread-twine; that was the kind of paint I bought from him. I bought paint from Mr. Jacobs. I would not say positively but I think it was along about March or maybe February. He had just put in this stock of paint and he wanted to sell it to me; I told him I would buy it if he had a very cheap red barn paint with a gloss to it and he said he had. I bought the very cheapest he had; I did not say anything to him at the time I bought it about wanting to get any particular shade of paint; I told him what I wanted was a very cheap red barn paint, with a gloss; I bought paint from Mr. Jacobs up to the time I left New Orleans, some time in June, I think it was, of 1913, four, five, maybe six months I bought paint from him, while I was connected with the Southern Koke Co. here in New Orleans. I did all

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the manufacturing of the syrup and did all the work, the painting and filling of the barrels, the shipping, and assisted Mr. Scott and practically did all the stenographic work. I bought the same kind of paint, same shade all the time from Mr. Jacobs. I heard Mr. Scott's instructions to the salesmen in the office. We always talked about the merits of the goods; I never heard him tell any of the salesmen or any one connected with the Koke Co., to tell dealers that they could substitute Koke for Coca-Cola. I never tell any of the salesmen to sell it to any of the dealers as and for Coca-Cola. While I was connected with the Co., I never heard any of the salesmen telling dealers they could substitute Koke for Coca-Cola. I never heard of any instance while I was connected with the company there, of Koke being substituted for Coca-Cola, neither did I nor Mr. Scott nor anybody else connected with the Koke office or Koke company, so far as I knew, ever authorize anybody to sell Koke as and for Coca-Cola, nor wink at the sale of Koke as and for Coca-Cola. The concern to bottle Koke here to the best of my recollection was the American bottling Co., or some name similar. They bottled Koke a month, maybe two months; after that we changed to the Crescent City Seltz and [1178] Mineral Waters Co., I do not think the first bottler was handling it to suit Mr. Scott. He was not making prompt deliveries, or something came up where he thought it advisable for the interest of the company to change. It may have been on account of not having sufficient bottles he

(Deposition of J. C. Mayfield, Jr.)

was not making prompt deliveries. I know we got labels as quickly as possible; Mr. Scott did but I do not know whether the American Bottling Co., used them or not. We got the first labels from Dallas, Texas. Mr. McCarty Moore, president of the Dallas office shipped them over. I think the labels were used on the bottles put out by the Crescent City Seltz & Mineral Waters Co., from the time they began. I did not hear of any complaints from the dealers, that is the grocery store and bar-tenders and people like that that bottled Koke was sold to, nor did any of our salesmen report that they complained that the bottles did not have any labels on them, nor did any of the salesmen report at the office that they could not sell Koke unless they put labels on it. If they had reported it I think I would have known it. I never saw Koke in any bottle other than splits bottles. I do not know what particular bottle the Coca-Cola people used. They used every bottle that could possibly be made. I do not know what bottle they used locally. (Koke label marked Exhibit #59.) This is a label that came from Dallas, Texas. There was a shoe-box full of them, if I am not mistaken; I guess about fifteen or twenty thousand. They were that same color, design and everything; that same label; those labels came from Dallas. When we first started doing business here, that was in either January or February, 1913—I believe that was the year—we opened up here in 1913. I think several cuts for that label came from Dallas. I think the Crescent City Seltz & Mineral Waters Co.

(Deposition of J. C. Mayfield, Jr.)

used that label on its bottles prior to May, 1913. I think that entire batch we got from Dallas was turned over to them. When that batch of labels ran out Scott had some printed, but I do not think he had any of those printed like that. The second batch of labels were different from that; where this label that has the name of McCarty Moore exhibited on it, in that same space we put New Orleans, Louisiana. I do not think it was the same color as that; all this [1179] blue background back of Koke in there, was not in it. I stayed with the Southern Koke Co., Ltd., from the time it was organized and opened until a couple of months after Mr. Scott died, I think Mr. Scott died in May or June, 1913. Cheevers worked for the Southern Koke Co., Ltd., for awhile. He quit two or three weeks after Scott died, within three weeks after he died I think. I do not know why he quit. I think Mr. Wright fired him. Neither did C. H. Whittle nor I. A. Whittle nor anybody else by the name of Whittle ever work for the Southern Koke Co., while I was there. He bought a small amount of stock, I think it was twenty-five or fifty dollars worth. He bought that stock right after Mr. Scott died and then within a short time, the manager who succeeded Mr. Scott bought it back from him. Mr. William Dalton was the manager who succeeded Mr. Scott. Neither did the Southern Koke Co., Ltd., nor anybody connected with the Koke Co., so far as I know, ever pay C. H. Whittle nor I. A. Whittle nor anybody by the name of Whittle, ten dollars one day and twenty dollars an-

†(Deposition of J. C. Mayfield, Jr.)

other day for selling Koke. Mr. Dalton gave Whittle part of the amount of money on one day and later on the balance. I do not remember the arrival of some labels from the Houser Printing Co., William J. Spier along in March or April, 1913 but we got labels on different occasions from the local printers. The Southern Koke Co., never had anybody in its employ or connected with it in any manner during the time I was here that had a black mustache. After I left New Orleans I went to St. Louis, and subsequently to Chattanooga Tennessee. When I went to Chattanooga, Tenn. we opened up in the Central Koke Co. I went to Chattanooga in the latter part of December, 1913 and we opened up for business along in January, 1914. We did not bottle any goods there ourselves, we secured a local bottler the Chattanooga Bottling Co., we supplied the syrup to them and they bottled it. The Central Koke Co., had customers in South Carolina. We had a customer in South Carolina known as the K. W. N. Pharmacy. (Letter marked Defendants' Exhibit #60) I received that letter from the K. W. N. Pharmacy about the time it bears date. We had lots of other customers in South Carolina. The date of this letter a number of our [1180] shipments to customers in South Carolina were returned without any explanation. They did not make any kick on the quality of goods, they had been handling the goods prior to that and they were satisfactory, and they never furnished any explanation whatever, although I wrote them, I got no reply from them. We

(Deposition of J. C. Mayfield, Jr.)

have a few customers around Chattanooga.

Cross-examination.

There were several concerns about the time of that letter (Exhibit #60) that returned shipments to us. I could give you one in particular, I might get him lined up again but I rather not tell you the names of our customers. There are no others on my mind right now. I would rather not tell you him, I might get him lined up and you people, your detectives would go and scare him again. One name is all I can think of right now. Several shipments have been returned I can mention possibly four or five some were South Carolina, I think all those came in around those dates were from S. Carolina, then we had others from other sections come back, I had no reason of knowing why they came back other than this letter, and the causes stated in that letter. We have had them come back all during the year we have been in business, nor have any reasons except I suppose they were due to instances of that kind, the goods were all right. We never had any sour goods, unless it gets very old, but we do not let it get old it sells off right away. That is the only reason why the shipments come back, only when people would bankrupt, possibly a half dozen have. There is no telling how many shipments came back to us for causes stated in that letter. That is my frank opinion. I got one or two other letters of explanation I do not remember the names. Those letters are in Chattanooga I have got them, one is from Kentucky and stated those same reasons, if I remember the state-

(Deposition of J. C. Mayfield, Jr.)

ments correctly, I do not remember the town, I do not remember where the other was from. The Central Koke Co., was organized and put into operation during January of 1914 and we got together and decided every thing during December, 1913, prior to January 1914 I remember making up some syrup for my own use. There was nothing shipped out prior to January, 1914. I think I made syrup in January, 1914 for my own use. I wanted those people that were interested to taste it, people [1181] interested in the Central Koke Co., are myself, Mike O'Grady, J. C. Cummings and Jesse M. Littleton. Mike O'Grady was in the whiskey business in Chattanooga and he is completely out, I would say in the last month or so. Mr. Cummings is from Chattanooga, he never lived in Memphis. Mr. Cummings owns a big farm, he is a real estate owner, and one of the esquires, Justice of the Peace, and a member of the Courthouse crowd. He is not in the whiskey business at all. The Southern Koke Co., have had their bottlers use three or four different kinds of labels, I think. This #59 was the label sent from Dallas. There accompanied those labels some cuts of that label. It was the first label that was used. The second label gotten up after this one was all disposed of by us. I do not know whether we had labels printed from this particular cut or not. Some were made substantially the same as this #59 label, and used in New Orleans. I do not remember whether there were some printed in New Orleans that had that dark blue back ground or not. I do

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not remember of any being printed like that, other than now what we got from Texas, we got some fifteen or twenty thousand, a shoe-box full, we used those up. Then the next label had a white background. I do not think they used the same color of ink as #59, they had more than one colored ink, that is a two colored ink, I think they had some red, the cut of Koke was in red and a white label. That label was printed after those had been disposed of. It is news to me that Mr. Bermudez of the Crescent City Seltz and Mineral Waters Co., testified that a large number of labels were delivered to that concern to be used on Koke and were afterwards destroyed, I do not know of the delivery of the labels that were destroyed by the Crescent City Seltz & Minerals Waters Co., it might have been one of these jobs. Exhibit #59 was used in New Orleans. I do not remember using other labels with the same background in New Orleans by the Southern Koke Co., Mr. Scott may have ordered them and disposed of them, not to my knowledge I was not there all the time and I do not remember. We had another label it was not exactly square but it was not a diamond shape. It had the picture of a lady on it. It was used on the bottles it had Koke on it. We had some Dope labels here, I could not tell you the proportion of [1182] Dope labels, bottlers as a rule never asked for them, but when they did we furnished them I never had any cause to remember it, for it to impress my mind. I could not tell you who printed those Dope labels, I do not know who printed them. I do not know

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who printed the Koke labels, we have invoices for them. They were printed in New Orleans, here is one invoice the last item. That is all we have here. The invoice dated New Orleans Feb., 3, 1915, from the Searcy & Pfaff, Ltd., 724 to 728 Perdido St., and one dated Jan., 31, 1914, by the Sutter-Van Horn Co., Ltd., of 443 Camp St., New Orleans, are the only label invoices that I have with me. I do not know whether all the latter is for labels or not. Part of it is for labels I think. "A" is a proof of a label I could not tell you who printed it, it was never used, but I would not say as to the particular color, that is just a proof. I think that was the proof of that label there, Exhibit #38, I would not say positively though. I do not remember who printed the second label it was printed here in New Orleans, there was a half dozen houses doing printing for us, I could not tell you which one. The A. Sappario Printing Co., did printing for us. Houser Printing Co., did work for us, I do not know whether they were printers or just lithographers and made the cuts, I do not remember whether they made labels or not. I bought paint from George Jacobs. I saw Mr. George Jacobs yesterday evening. I did not take a subpoena out there to him. I think he has been presented with a subpoena, I do not know and I presume he has. I called at the place of business of Mr. Jacobs, quite awhile ago, I told him at that time that the Coca-Cola Co., was suing the Southern Koke Co., Ltd., Mr. Jacobs came running out to meet me when I got off the car, he and I were very friendly and

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asked me what I was doing back here. I told him I was down here getting up evidence in this litigation and told him what it was and asked him if he remembered selling me paint, he said yes, I told him we would want him to be a witness, he said he would be mighty glad. That was all that was said on that particular occasion I was by myself at that particular time. The same day or the following day I called there with one of the attorneys for the Southern [1183] Koke Co., Ltd., Mr. Frank Norman and myself went down there and he was a couple of doors above there and we waited for him, when he came down I introduced him to Mr. Norman and he was very friendly. I told him Mr. Norman was an attorney around wanting to ask him a few questions, and he said he would be mighty glad to answer them, and Mr. Norman asked him if he remembered selling us paint and he said "Yes," and Mr. Norman asked him what kind of paint, he said, "It was the cheapest paint I carried." He got one of these cardboards and showed Mr. Norman, and told him the name of it. I was in a hurry to get back to the office and I was there and when Mr. Norman was shaking him by the hand, he come up and was glad to meet him, I went on back to the office. Mr. Norman was about ten feet behind me. That was all that happened on the two occasions. I had not seen him up to yesterday except when Mr. Norman was with me. To what I have testified to was all the conversation that occurred on both of these occasions. I do not remember the particular streets our office was located on in

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Denver, it was between 17th and 18th street, I was calling it the Celery-Cola Co. Myself and a party from Texas were interested in that concern. I do not remember his name. He was not there but just a little while, he was around on the road. I sold in the City, I did not go out on the railroad work, that was a long time ago. I was selling Celery-Cola and Koke then. We had a bottler, I do not remember the bottling works but I can give you the address, it was on Blake St., on the corner of 22d or 23d, right around the corner from the laundry. I do not remember the name of the bottler. He was only bottling Celery-Cola for me. I did not have a Koke bottler. Our place of business at Denver was a laboratory. I made the syrup like I made it here in New Orleans. The Celery-Cola Syrup was made different from the Koke syrup, a little different in flavor. I sold Koke all around Denver, to the drug stores. I do not remember the names of them. This Celery-Cola Co., was separate from any other company. We kept books and accounts of that Celery-Cola Co., I do not know where they are. We collected up all we could and there was no use lugging the books around I may have thrown them away. On the stationery of the [1184] Celery-Cola Co., was The Celery-Cola Company and the address and telephone number. That is required by law in Colorado. It was an Arizona Corporation, I can give you the address of some of the drug stores, but I do not know whether it was the Koke or Celery-Cola that I sold them, that is the particular name I might give you.

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One of the biggest department stores there, I think it was the Denver Dry Goods Co., I remember I gave them fifty or a hundred dollars worth of tickets to enclose with their statements to people to come to their fountain, I do not remember whether it was Koke or Celery-Cola. If it was Koke it had Koke on it if it was Celery-Cola it had Celery-Cola on it. Then there was another, Shultz Drug Co., they owned ten or twelve drug-stores there. I remember we sold them, but what quantity and which it was I do not know, possibly they bought at one store and delivered to another, or maybe just one store handled it, I could not tell you. Then the Denver Pharmacy, I think that was the name of it, that I sold them some, I do not know which it was that I sold them, the Denver Pharmacy address is between 16th and 17th Streets, between the Brown's Palace and the depot. I sold some out to the city parks, they had some I do not know which it was I sold them, and then a drug-store out there, I sold them some, I do not remember their name, and then there are a number of drug-stores on 15th and 16th streets, I cannot remember the names. I have told you all that I can remember. I am not positive which it was Celery-Cola or Koke. Then there was a "raft" of them, I do not give in that, I do not remember the names. I gave one of those drug-stores I guess fifty or a hundred dollars worth of tickets to send out also, to mail out with their statements at the first of the month, in fact I gave all the drug stores more or less. Those tickets were printed in Denver. Several little fellows printed

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them, I always patronize the little fellow, several of them but I do not know which one printed them. I never tried any other color of paint than red, except maybe a half pint of dark chocolate color if I recollect. It was not satisfactory, I tried it and painted several little kegs, and the following morning they were still as wet as when I put the stuff on there and I could not use it for that reason. When [1185] I said I had seen Coca-Cola in every kind of bottle possible, I meant to be used on a crown machine. A split is the only bottle I have seen Koke in in New Orleans, our bottlers use different bottles, I cannot tell all they use. I saw it in a split bottle, I saw it in Chattanooga in a dark bottle, in a different shape from that and saw it in a white bottle. I think about a seven-ounce bottle. I always gave salesmen a few circular letters I had drawn up, and let them read them over thoroughly, which covered practically every point of instructions. I have not got one, but they were about the merits of the goods and the price and the time they have been used on the market. In that circular letter I told them my father was one of the first men in that line of business that this line of business, this drink, had been on the market that long. Every one that went out for us were given that kind of circular letter. There is one named Williams that went out of here, there is one named Moore that went out of here, and there is one out of Chattanooga named Peck and another out of Chattanooga named Heck Park and another out of Chattanooga named Turner, and there was on differ-

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ent occasions I guess fifteen went out of Dallas, Texas Office, I do not remember the names of all them. I do not remember Helwick, I did not give it to Cheevers. That was a letter dictated by me. I would go to the files and get one of them, no particular letter. I guess there are some of those letters there in the file, I will undertake to find one if I can and bring it down here.

Mr. HIRSCH.—We reserve the further right to cross-examine Mr. Mayfield when the letter is produced.

Redirect Examination.

The reason I did not want to tell the name of the customers was that they could be browbeaten, threatened by the representatives of the Coca-Cola Co. I spoke of a letter from Kentucky and another letter that I got from customers and letters from the K. W. N. Pharmacy, when I go back to Chattanooga I will look up those letters and send them to the commissioner if I can find them.

Mr. HIRSCH.—If he does that we will want to cross-examine him again, Mr. Littleton.

I was not with the Southern Coke Co., Ltd., here in New Orleans, in October, 1913. I [1186] would not say positively they had adopted and begun to use the yellow label on Exhibit 38 before I left here. I had some with me, I got them when I was in St. Louis. I do not remember whether I carried them or they sent them to me. In reference to this conversation Mr. Norman and I had with Joseph Jacobs, Mr. Norman in my presence on the occasion

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of the visit down to Mr. Jacobs asked whether or not anyone connected with the Southern Koke Co., Ltd., had said anything to him with reference to getting any paint similar to Coca-Cola paint, or the paint the Coca-Cola Co. paints its barrels, and Mr. Jacobs denied that. I remember distinctly that that question was asked him, and he said no, they had not.

Mr. HIRSCH.—We move to strike anything as to what the witness has testified as to what any other witness has said, as being hearsay and incompetent testimony.

Objection overruled and appeal hereby prayed and granted.

I left Jacobs' place of business and went on back to the office, about a half block away, and Mr. Norman came right in behind me. When we got there Mr. Norman wrote out what Mr. Jacobs had said, he was at the machine, I do not know whether he dictated it or wrote it himself. Nobody else was present besides myself, Mr. Norman and George Jacobs at the time this conversation occurred, just the three of us.

Recross-examination.

I did not use that phrase "line-up" on cross-examination at all. I think the term I used was "get them in line." I think I meant to get them to buy our goods. I know a salesman named Mr. Duran. I gave him one of these letters, I guess.

Redirect Examination.

I lost all our Celery-Cola trade out there in Denver, the druggist told me he—

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Mr. HIRSCH.—We object to what anybody told the witness.

Objections overruled and appeal prayed and granted.

I found out later to my own satisfaction, I do not know whether it will suit you or not, the druggist told me and the dispensers that people representing or selling Coca-Cola had told them that when a party asked for Celery-Cola to give them Coca-Cola with celery in it, they have the celery extract behind the counter, and they would not put in the [1187] proper amount of celery in the Coca-Cola, but a very improper amount, it would nauseate and they would put too much, very unsatisfactory. I have drank it myself on calls for Celery-Cola and it made me sick, so much celery extract.

Recross-examination.

That occurred in Denver, Colo. I cannot give the name but I can give the address, it was on Arapahoe St., and 16th St., right on the corner. I did not hear any Coca-Cola salesman say that, this man told me that the Coca-Cola man said that. That is not the only druggist. I do not remember who it was, there were several others. I never called the Coca-Cola Co.'s attention to it. I never said anything to anybody about it, only the druggist, I told him it was not right. It was the proprietor, and I remember going to the dispensers behind the counter and telling them they should not do that. I do not remember the names of any of the dispensers. That was sometime in 1908 or '9. I guess this druggist was in the

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business when I left Denver. I would not say positively when I left. I was back in Denver since. I do not remember going around there then. The conversation was that he told me that when a man asked for Celery-Cola to put a little celery in the Coca-Cola.

Mr. HIRSCH.—I object to that as hearsay.

Objections overruled and appeal prayed and granted.

I got a dollar a gallon for Celery-Cola out there. I could not tell you how much the Coca-Cola Co. were getting for Coca-Cola.

Mr. HIRSCH.—I move to strike everything that someone told the witness as being irrelevant and incompetent, about what the Coca-Cola salesman told the druggist and what the druggist told the witness.

Objections overruled and appeal prayed and granted.

Redirect Examination.

The druggist handling Coca-Cola in Denver, Colo., actually put the celery extract into Coca-Cola and sold it to me when I asked for Celery-Cola, and to a number of my friends who told me.

Mr. HIRSCH.—I object to what his friends told him as hearsay.

I drank it myself, it was very sickening and nauseating, they would do that when I would go in and ask for Celery-Cola. Further deponent saith not.

[1188]

Deposition of J. C. Mayfield, Sr., for Defendants.

J. C. MAYFIELD, Sr., a witness produced on behalf of the defendants.

I am fifty-seven years of age and live in New Orleans. I am president of the Southern Koke Co., Ltd., and president of the Koke Co. of America. I was born in East Alabama, in the country, about five miles from a little town, Rock Mills, Randolph County. In 1887 an uncle of mine had formerly been in business and we sold out in Rock Mills, Ala., and we had a little money, his name was Randall. Mr. Randall noticed an advertisement in the "Sunday's Constitution" where the ad wanted a partner to join in a manufacturing business. He called my attention to it, and I told him to answer the advertisement, and we got a reply from Dr. Pemberton. Well, we were both favorably impressed with Dr. Pemberton's letter, because I had been in business in Rock Mills and had sold drugs, and so had he, that is, plantation remedies, and we had sold some of Dr. Pemberton's specialties, and of course a few letters passed and we both went to Atlanta and had a conference with Dr. Pemberton, and he showed us what he had, went over the whole business, made us his proposition and of course we did not accept it. We went back home and had the matter under discussion and my uncle decided that he would not go in with it. Of course that did not put me out altogether, but as it was not as much money as the Dr. thought he would get, that he would get two thousand from me and two thousand from my uncle; but a few

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days thereafter I got a letter from the Dr. that there was some other men figuring with him that would put in some money, Mr. A. O. Murphy and Mr. Bloodworth.

Mr. HIRSCH.—I do not want to interrupt the story, but if you have not got the letters I object. I do not want to interrupt Mr. Mayfield's story.

Mr. LITTLETON.—I do not think we have the letters, we will prove they are lost.

Mr. HIRSCH.—I object to the reference of the letter.

Objections overruled and appeal prayed and granted.

(Continuing:) We three met in Mr. Pemberton's place of business at Atlanta and went over his business very thoroughly and we agreed to go in with him, that was along, I reckon, in November. I was to put in two thousand dollars, Mr. Bloodworth two thousand, Mr. Murphy [1189] two thousand, and Mr. Pemberton was to put in all his business, stock goods he had on hand, goodwill, formulas, trademarks, and everything of every nature and character pertaining to his business for another fourth interest valued at two thousand dollars. There was no agreement drawn up just at that time, but it was agreed and I moved my family to Atlanta, sometime shortly thereafter in December. Mr. Murphy or Mr. Bloodworth was a little bit delayed about getting up their money, and it was some time in January, 1888, that the articles of agreement were drawn and signed by us all. But through the latter part of Dec., in 1887,

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and January, 1888, before the articles of agreement were signed, I was around his place of business all the time and was getting well posted as I could, because it was agreed that I was to do the manufacturing, and I think it was in January, I do not know just the date, but from the middle of January, that we signed up. We did some manufacturing at his old place on Marietta St. I have forgotten the number, it seems to me like it was one hundred seven Marietta, somewhere along there, it is below the postoffice. We did not like the place and we looked for a new place on South Pryor St., I think it was the corner of Pryor and Hunter, and we moved down there, maybe it was in the last of January, we moved everything that Dr. Pemberton had. We had the office on the first floor and the laboratory and all this other stuff on the second floor, upstairs. Dr. Pemberton was in bad health. We did not know at the time what was the matter with him but it developed later that he was a drug fiend, of course we were all very much put out by the fact, so much so, that Mr. Murphy was, you might say, disgusted. Dr. Pemberton had a son, an only child, Charley Pemberton, who knew all about manufacturing these specialities and when we first went he was in Louisville, Ky., with some drug firm, but he heard that his father was making a good deal and putting a lot of money into his business and he came back home, thinking, possibly, in fact he discussed it with me, that he would do the manufacturing, but it was agreed and understood that I would do the manufacturing. Naturally it cut the son out

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of a position. He was disgruntled, dissatisfied, and made it up for the old man, Dr. Pemberton. [1190]

Mr. HIRSCH.—I object to any discussion that took place, any relation of a discussion, or that he was disgruntled.

Objections overruled and appeal prayed and granted.

Anyway Dr. came to us and told us he would have to give—

Mr. HIRSCH.—I object to what the Dr. told him, it being mere hearsay.

Objection overruled and appeal prayed and granted.

Mr. LITTLETON.—Go ahead.

(Continuing:) That the son contended that he had promised him the Coca-Cola business. Of course it was a bomb in our camps, we did not know what he meant by it. He said he would have to give him that business in order to keep peace. We did not agree to it and we ran along there quite a little while thereafter, undecided just what to do, and he told us we could make the same goods and call it something else.

Mr. HIRSCH.—I object to what the Dr. told him, as being hearsay.

Objection overruled and appeal prayed and granted.

We all discussed it in the Dr.'s presence and agreed that we would make the same goods and call it something else, the same formula.

Mr. HIRSCH.—I object to the agreement and the

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discussion, as being hearsay and move that it be stricken.

Objection overruled and appeal prayed and granted.

(Continuing:) Among the names discussed and talked about was Koke, some of them suggested Yum-Yum. We may have put out some little under the label Yum-Yum but I do not have any recollection about that. This was possibly in April or May, along there, and we commenced thereafter selling to our trade that had theretofore been buying Coca-Cola, we did for some time, however, sell some Coca-Cola to the old Coca-Cola customers. We had considerable money in the bank, all we had put in as the working capital. I was not the chemist but I was doing the manufacturing and I made up a considerable collection of goods, of every kind, and of course made up the Coca-Cola syrup. After we did not ship it out as Coca-Cola or would not ship it out as Coca-Cola we shipped it out as Koke. Mr. Murphy sometime in the latter part of May or June severed his connection. He was still dissatisfied with the way he had been treated and we agreed to relieve Mr. Murphy, that is, allow him to draw out, and we drew up an agreement to that effect, and he drew out and went home, back to Barnsville, Ga. Dr. Pemberton and Mr. Bloodworth and myself continued the [1191] business as three partners. A short time thereafter Dr. Pemberton died, I do not remember just when it was, how long, in the same year. We had to make a settlement, of course, with the Pember-

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ton estate, Mrs. Pemberton and her son, particularly with Mrs. Pemberton. We did not have the money to buy her out and he did not have the money to buy us out and we did not care to be connected with her son Charley, who was disagreeable, a sort of a drinking kind of a boy, and we made a settlement whereby Mrs. Pemberton took the formula and business of the Indian Queen Hair Dye and we had quite a lot of manufactured goods and we gave her one-third of the manufactured products. She did not want to leave it in our place of business, she did not care to have it there, and she made arrangements to have it stored with Asa G. Candler, that was hauled up to Mr. Candler's place of business. I told Mrs. Pemberton, however, that as soon as we worked off our manufactured stock I would help her dispose of hers, which I did. It was not long, maybe eight months or a year, I took back all, bought back Mrs. Pemberton's manufactured goods, sent up there and got it. Then Mr. Bloodworth and I continued with other specialties we had, that is, the manufactured specialties. We had then Wine of Coca, Koke, Globe Flower Cough Syrup, and his blood medicine, Pemberton's Compound Extract of Stillinger was the name of the blood medicine. That was along up in the first part of 1888 or the first part of 1889. We moved then around from the South Pryor Street place to Trinity Ave., in a little cottage we got for a good deal less money. We continued around there for 1889. Mr. Bloodworth kept the books, I did what manufacturing was to be done, there was not very much, however,

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only except the syrup. I do not think we made any of the other specialties because we had a good stock on hand, but of course were disposing of it. We decided that we did not have money enough to push all those specialties and we would get rid of the manufacturing of patent medicines and push Koke only, which we did right along, and sometime in—maybe it was 1890—'92, I met an old friend of mine in the Kimball house in Atlanta, a fellow named Ealey, a fellow from West Point, Ga. He was a tradesman. He asked me what I was doing [1192] up there and I told him about these specialties. We were not pushing Wine of Coca or Globe Flower Cough Syrup, and one word brought on another until we made a deal there in the Kimball House for the Wine of Coca, which we considered sort of dead stock to us, for we could not push it. That is, we did not have the money to use it, it was good stuff, however, but we did not have the money to push it. It was sometime in the latter part of 1902 or 1903—'93, Mr. Ealey wanted to put some of his specialties on the market and I met him back at Atlanta and he come after me to help him put that on the market and he decided to put the Wine of Coca in a syrup form as well as in the wine. The only thing to leave out was the wine, and put in the water and sugar is my recollection, and the only change to be made, and he organized the Co., the Wine of Coca Co. He had been dealing in real estate quite a little while, and we agreed to go into the real estate business, and we formed the partnership of Ealey and Mayfield, the

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real estate firm, that was in '92 or '93. We continued in the real estate business up until the latter part of '98. At the same time he, however, Mr. Ealey with his friends and associates, I helped him all I could, pushed the Wine of Coca business. We handled the stock of the Ealey and Mayfield firm, handled the stock of that company around trading in the real estate deals and Mr. Bloodworth all the time was looking after our books, of the Pemberton Medicine Co. We had considerable accounts on the books, we disposing of our manufactured patent medicines and pushing out Koke as best we could. Mr. Bloodworth continued along there with me until after the Exposition there, it seems to me it was in 1900, if I remember, and he decided to go to Macon, Ga., and go into the cotton business. He had everything in pretty good shape and he thought he could do more down there in that business, and I bought him out. Of course my wife and sons, along there, in the meantime were helping Mr. Bloodworth as best they could. I would help of evenings and if anything came up we would discuss about the business and after Mr. Bloodworth went away I employed a man by the name of McCowan, who I think was in the newspaper busines, soliciting [1193] advertising, something that way, in Atlanta, to give me the time, anyhow he looked after my Koke interest with my son too, of course with my help from time to time up to about the first of '99 or last of '98. The Wine of Coca Co. people decided that they wanted to open an office in Boston and they wanted me to go to Bos-

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ton to establish same there. I forget the man's name up there he had money there and as he wanted me to install equipment, which I reluctantly did, and I did go, and I thought I would just move my Koke business to New York. I did not know but what I would stay there after getting the Wine of Coca people lined up, and my son went on ahead of me and picked out a little place in Jersey City. I would go over there often from Boston and manufacture goods for him. I did not manufacture every time, it was in the winter, but I would go over there and see how he was getting along. But, was not there very long, maybe two or three months. I got a letter from my father, who raised all my children, the other three children were then living with him, one of them was sick and I decided it would be better for my business and friends to go back down south. So I left Boston people, I was practically through with them, anyway. Told my son that I was going back home, which I did. I made a bee-line to where my children were. The child was not very sick. I stayed there two or three weeks, that was in '99, sometime in the latter spring, maybe April or May, somewhere along there. That was at Roanoke, Ala. Then I went back from Roanoke to Atlanta. Of course all my customers were Southern, Atlanta and the Southern States. I corresponded with them and let them know I was in Atlanta, called on what others I had there, and I did some manufacturing in Atlanta, supplying the trade for two or three months. Then I met an old friend of mine that lived in Birmingham.

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I told him what I was doing, and I was undecided as to whether to stay in Atlanta or go some place else and he and I made a business arrangement which was satisfactory and I moved from Atlanta to Birmingham. That was in '99. I had been experimenting a little bit along in Atlanta and other places making other beverages and I had decided that a Celery Cola—celery was a good tonic and it might [1194] be a happy hit to make a beverage and call it Celery-Cola and I explained that to him and he said that struck him exactly, too, and he said he thought that would be a winner so we opened business in Birmingham and started a little bottling business, and bought a little—the first we bought was a Hutcheson plant, the Hutcheson stopper, but that did not last very long. He swapped that off for another machine, the crown machine. And after I made arrangements with another friend of mine, Mr. Brittian, to push Celery-Cola in Birmingham and adjacent territory around there. I had another friend in—I had been corresponding with in St. Louis. I went to St. Louis to see if I could not organize a company there. It was a bottling company, and made arrangements to get the goods on the market, but we did not succeed, however, but I did continue to advertise and circularize and take care of what customers I had back south with goods out of St. Louis. Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making Celery-Cola and Koke, and in Nashville I lined up a bottler, Diehl & Lord. They preferred the Celery

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Cola name and bottled Celery Cola for several years, I do not know just how long, but all along my friend, Brittian, in Birmingham, was doing a little business. Of course, none of them, none of my agents then or now, ever had any interest in my formula or trademark. They always bought their compound from me and I had arrangements that I could do my manufacturing in their places of business without cost, and have my materials come there. If the Birmingham plant needed material, needed compound, if I could not run down there and make it I would ship it to them from whatever point I was located, Nashville, St. Louis, or wherever we might be. In 1900, maybe 1901, along there somewhere, I met a friend from Tennessee, that had a lot of oil leases, and I made an arrangement, deal whereby I was to become interested in his oil leases, and I promote in Nashville an oil company called the Mayfield Oil Co., and together with his leases and others we secured in Southern Ky., and East Tenn., we made for a while a success of the oil business. We thought it was going to be a success. We had thirty some odd producing wells. In [1195] promoting the company I had quite a lot of promoting stock. Now, I will go back to Birmingham with my friend Brittian. Brittian got one of his friends interested, a man by the name of Schuyler, a man who had put some money in with him and was pushing the Celery-Cola business very satisfactorily. Schuyler was auditor of the Asheville Iron Co., and a very prominent business position and a very influential and very nice gentleman.

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I thought he was all right, and he had a little spare money, and he took a little interest with the O. L. Gregory Vinegar Co., of Birmingham; he had a half interest, I believe, it was, and he put about three thousand dollars in the Celery Cola business of Birmingham. Well, maybe, I had a pretty good thing in the oil stock; I was getting money on it right along, and he needed a little money to push his Vinegar interests; he wanted me to take over his interest in the Celery Cola business there, which I did. Well, that left it with the little bottling business there in about 1901, the Birmingham agency belonging to Mr. Brittian and myself. We sold that plant, Mr. Brittian did, to a man named Fox. He got cash and a note for twenty-five hundred dollars. Mr. Brittian sold that note to the Jefferson County Savings Bank of Birmingham without recourse and then he wanted to go to St. Louis and start a Celery Cola Bottling Co., which I agreed for him to do. Mr. Fox continued the business there in Birmingham, bottling Celery Cola; I never made any goods in Mr. Fox's place of business; I shipped him from Nashville. I was busy there with other companies and with the oil business, and I supplied him with Celery Cola and Koke; Mr. Brittian, I do not think, ever bottled any Koke, but he did bottle Celery Cola, that was in 1902—maybe 1901 or '2. Well, Mr. Fox went right along, someway, I do not know just how it was, anyhow he left the city for some reason and we never did know where he did go to or what became of him. He owed quite a little bit of money for compound that

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I had furnished him, and the bank had this mortgage and they foreclosed on him. They wound up the business and some other parties in Birmingham, a man by the name of Ensley, Ensley & Moody, bought the plant. Of course, I was there and Mr. Schuyler were all present. I was— [1196] at that time Mr. Schuyler owned all the O. L. Gregory Vinegar Co., and changed it to the C. H. Schuyler Vinegar Co. Well, the oil stock was still advancing, and I had quite a good block of it, and he wanted me to take a half interest with him, in the C. H. Schuyler Vin. Co., which I did, and I paid him two thousand dollars for a half interest. In less than six months that went up in smoke, and this bottling plant was moved into it, we had room in the Vinegar Co., for it. Mr. Schuyler got in on the wrong side of the market; I don't know, and our business failed. It was necessary for me to take hold to save what could be saved and pay—there were some other debts against the company. I had to close out and move out from Nashville and St. Louis and go down there to try and save myself, and I took over the bottling plant. That was in maybe 1903, along there, the latter part of 1903. Well, then I run the—I changed the Schuyler Vinegar Co., they run it a little while under that name; I discontinued that name, however, and went on under my own name of J. C. Mayfield Manufacturing Co., we were running in Birmingham, the very beginning, with Brittan under the name of the J. C. Mayfield Manufacturing Co.; then I owned practically the whole thing. Then I stayed there and pushed that

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business from 1903, '4, '5, '6, maybe '7 and '8. I was first on S. Twentieth St., in a big building and I had more room than I really needed. Then I moved over on Morris Ave.; I do not know just what time, but I continued there. We, of course, ran the bottling business; that was a local business. I run my Celery Cola and Koke business supplying the trade wherever we could get the business. My sons were on the road; I did considerable circularizing sending out samples, securing business in every way we could. We bottled not only Celery-Cola and Koke, but we bottled other flavors, but they were our specialties and we were pushing those, and at the same time we had another specialty that we had a pretty nice run with, Pepsi-Nola. When we—about 1908 my daughter married in Birmingham, and I decided there was more money in the specialty business, not to have so many things, and I gave my son in law the bottling business, with the understanding that he raise up a company, [1197] form a company there and push the business; he only took, however, the brand Celery Cola, is my recollection. I then came west. That was in the latter part of 1909. I had, however, my sons, and I had been back in Dallas all along, so many of my sons are young and everything else, it is pretty hard to bring all this up at one time, but one of my sons, J. W., had been out to Dallas, Texas, and started an office out there, in the same line of business we had back in Birmingham, and he had gotten a bottling business in Dallas, started to bottling Celery-Cola. The bottler seemed to prefer that

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label, but he did a general extract business. I do not know whether he shipped any syrup or not, but he sold Koke and Celery Cola and there we had a little line on another beverage, I believe it was Pepo-Ade. I was all the time experimenting, and—well, that was—he went there in '94. Nineteen and four. He lost his health and the younger boy went out a little later. They had quite a little business built up. Then the older son made one or two trips over Texas for him. He filled the orders from Dallas. Of course, the boys were making a living and sowing seed for my different specialties. Well, then when I went west I stopped at Shreveport in 1909, and I got a bottler there started. I have forgotten his name now; I believe it was Robinson Bros., in West End. But, to go back to Birmingham, when I left there with my son in law and his associates in the bottling business we supplied them with other compound from St. Louis, sometime during that first year he was in business, a wholesale drug firm in New Orleans ordered a gallon of Celery Cola syrup. They expressed it to them and it was carried down through their shipping department, turned over to a chemist, a U. S. chemist, and they reported that they found Cocaine in Celery Cola. I was notified of it; I was out west. I notified my chemist Van Dusen about it. Of course, we knew it had no cocaine in it when it left the St. Louis, and we could not account for it. Mr. Van Dusen came on up to New Orleans and explained here to the chemist that there was no cocaine in our goods, but they contended that they found it in that

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sample. But, we had up to that time of the passage of the pure food law, and when it took effect, of course used the fluid extract of Coca and we had the goods all over [1198] the country in the hands of the bottlers and the fountain men. We tried to get it back; we thought we did have the most of it back. I remember very well of destroying quite a lot of it. But it was found that some of this returned goods was in the plant there and they used it. We had two or three ways to account for that, either they used some of the goods made prior to this act going into effect, which had been shipped back, or they had experimented a little themselves, or had been put in after it left the factory. I did not like to see my son in law lose out entirely in Birmingham and I made him a deal where I got him his interest back in the Birmingham Celery Cola Bottling Co.; I would not say but I do not believe I was ever a stockholder of record but they did get a suit against them back there in the court in connection with this sample of Celery-Cola that had cocaine in it, and my name was mentioned in the suit. The other partners who were connected in the business cared nothing about it, because the business had been wound up by the bankrupt court and there was no defense, is my understanding; in fact, I was never served with a summons was not present and presume they just took the shortest and quickest way out of it. Well, that went down against us, under those conditions against Celery Cola which virtually murdered it unjustly. My competitors used it against us, and I saw it was an uphill pull to try

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to overcome a thing like that. Well, we had had a good trade on Celery Cola and a good trade on Koke, a pretty fair trade on Pepsi-Nola, and I made up my mind then to give my entire time, push and energy to Koke because it had not the black eye that Celery Cola had. Well, when I was in Dallas, along after my son had gotten a little business started in Dallas, and because I made a deal, some deals with some parties on Celery Cola, they were pushing Celery Cola, but they did not have much money and they got a man interested with them that was worth money, but the money he put in was borrowed money and he went to the bank to borrow it, and when it came pay-day they got hard up. That was along in 1910. They wrote me to Shreveport that they were in deep water, that the bank was pressing them and for me to come over. I went over and conferred with them and they wanted to turn me back this [1199] territory and business and give them a chance to get on their feet. I investigated and saw it was impossible. They would not agree to cancel it entirely, so I thought best to keep the business alive for them and then have to give it back and the Celery-Cola having a black eye through the decree made up my mind to push Koke in Texas. I went to Ft. Worth and pushed Koke there. I had my youngest son come from Denver and join me in Ft. Worth. I got a pretty nice business started in Texas and contracted with a man by the name of Clarke for the State of Texas and showed him what I was doing, and turned everything over to him, and he was to push the busi-

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ness and keep it going. Then I went to Little Rock, working up a trade there. In 1911 my son came to Little Rock and went on the road, talking and pushing Koke. I built up a nice trade there. I gave a man by the name of Parvin a contract like I did Clarke.

That was in 1911. I heard from some traveling man along there that—I forget just how I got it, there was a firm in Murfreesboro that owned a trademark on Koke and I was spending lots of time and money in building up the business for them. The man thought I knew of it. I really opened—I do not remember the name just now, but I did not write the Murfreesboro people. I went to see them and I found out it was true. They were doing a pretty nice business they said and showed me their registered trademark. I explained to them my long usage. I knew I could win out in the courts but I did not care to do that. They had done some advertising, popularizing my Koke and finally I said let's see if we cannot get together on a business proposition. Well, we did. [1200] I bought the Koke for the U. S. except the state of Tenn. I then went back to Dallas, Texas. Mr. Clarke in the meantime had a deal pending with some parties in Dallas for his contract in Texas. The party who was figuring with Mr. Clarke wanted the contract providing he could get the state of Okla. and he wanted Ark. I got the Ark. territory back from Mr. Parvin and closed up the deal with the Dallas party, Mr. Moore. They organized the Koke Co., of Texas. They met with success and liked the business and wanted to

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open offices elsewhere. We agreed on a sort of option on La., Miss., and Ala., with an office at New Orleans. Mr. Moore came here and made the deal with Mr. Scott. I was not present but knew of the arrangements. I was in Little Rock resting. My youngest son who was familiar with the business, came here and assisted Mr. Scott. Mr. Scott and my son kept me pretty well posted. Mr. Moore was president of the company and I had a very little to say. I came back when Mr. Scott was killed. Some new arrangements had to be made. Mr. Dalton took the management. He was not experienced in that line of business. Mr. Dalton and my son got after me to come down and relieve them take the office and look after it, which I did, in Sept., maybe 1913. Since [1201] that date I have been in actual charge. The directors held a meeting and Mr. Thomas L. Wright, who was then acting president, resigned and I was elected. I believe that brings me up to date. Of course there is a lot of little things and changes that I have not told that you can refresh my memory on. Those letters I got from Dr. Pemberton back in 1887. I have not got those letters now. They were destroyed long ago. I did not keep those things that far back. Defendants' Exhibit #13 being a photograph of a page of the Atlanta Constitution of October 2, 1887, is the advertisement that I spoke of that I saw in the paper and answered when I later got the reply from Dr. Pemberton. (Reading:) "Wanted an acceptable party

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with two thousand dollars to purchase one-half interest in a very profitable and well established manufacturing business, absolutely no risk. A guarantee of 50 per cent profit on investment with possibilities of much larger profit. A rare opportunity to the right party. A full investigation solicited. For particulars address with your real name business 8½ Marietta St., Atlanta, Ga.” 8½ Marietta St. was not the place where Dr. Pemberton was doing business. I do not think Dr. Pemberton ever explained to me why he put that in the paper that way, but the facts are Dr. Pemberton owed a good many little bills around against him, his business, and I don’t think he wanted his creditors to know that he was selling out, sorter wanted to get hold of some money to ease things up; that is the impression he made on me.

Mr. HIRSCH.—I object to that and move to strike it out as hearsay testimony.

Objections overruled and appeal prayed and granted.

We answered that advertisement immediately and got a reply back, and it was a few days thereafter. We were not in business, but as before stated were seeking an investment. I would say that we went possibly as soon as we heard from our letter. When we went to Atlanta we went to Dr. Pemberton’s place of business to see him. His place of business then was 107 Marietta St., that is my recollection. He was doing business under the name of Pemberton Chemical Co., it was a two-story brick residence.

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He was still in business. He had an office in the front [1202] room, the back hall had his manufactured goods in it, all the first floor was used for the laboratory, his basement was also used, and Dr. Pemberton lived in the second story. He was then making Wine of Cola, Coca-Cola, Globe Flower Cough Syrup, Indian Queen Hair Dye, Triplex Pills, he made a liniment, Mustang Liniment, his blood medicine, Pemberton's Stillinger, Pemberton's Compound Extract of Stillinger; I believe he had a preparation he called lime juice and ginger. That is about all I can remember now. During my visit there in 1887 I saw Dr. Pemberton actually making Coca-Cola syrup. Dr. Pemberton and I had agreed to go in business, regardless of whether the other people came or not. I moved over and he was a sick man, as I said before. I was helping him. He was teaching me how to do these things. I helped him and was pretty handy at that as I had formerly been in a drug-store, knew how to manufacture some of the preparations before we actually took charge, and I, of course, did not know the formula as to how they were made, but I helped him with the Coca-Cola syrup. We manufactured there all those things in a small way, sort to have a little stock on hand, to take care of the orders. It took us nearly past January to find the new place to move, and we had those things manufactured up already, we commenced manufacturing right along when we agreed to go in with him. Dr. Pemberton had everything on hand

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we would need to manufacture the Coca-Cola syrup when I went there. We never bought anything new additional thereafter. He had percolators to percolate the coca leaves and get the extract of coca, and coca leaves on hand. He had a copper kettle to dissolve the sugar and bring it to a boiling point, the water and sugar, these other things were added, that was about the only machinery he had for the purpose. A written contract of partnership was drawn up between us. I have not a copy of that contract now, nor the original. Mr. Murphey was the office man, Mr. Bloodworth was the road man, and I was the laboratory man. These papers were turned over to the office man, and after Mr. Murphey left us, Mr. Bloodworth was the office man, and he took charge of all papers of the company. I never had them in my possession except as being connected with the firm. The terms of this contract were just about like all other set contracts drawn [1203] up by a good attorney. It recited all the facts, we three were to put in two thousand dollars cash, Murphy, Bloodworth, and Mayfield, and Pemberton was to assign to us his assets, goodwill, trademark, formula stock on hand and everything he had pertaining to that business he had for one-fourth interest. We were all in, it was a four-cornered arrangement, the partnership we had. The right to sell and manufacture Coca-Cola was included in that contract. It was a four partners, we each had a fourth interest, in the agreement I had a fourth, he had a fourth, he deeded to us, you might say, a three-fourths, and re-

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tained one fourth. He put in his business against our six thousand cash, which made everything he had valued at two thousand against our each two thousand dollars. I actually paid two thousand dollars into the partnership, Mr. Bloodworth paid in two thousand, it strikes me that Mr. Murphy paid fifteen hundred and gave his obligation for five hundred; anyhow we all had a fourth interest, and we accepted his money, and if we gave paper we accepted his cash.

Q. 49. Now, was the formula for making Coca-Cola made known by Dr. Pemberton to the members of that partnership at that time? A. It was to me.

Q. 50. Now, explain, did he just tell you what the formula was, or how was that, how did he make it known to you? A. He got his formula book and called it over to me word for word before we left the Marietta Street place, before the contract—Oh, well, anyhow, it might have been after, but he was in bed sick and we thought we ought to have it, you know, we were looking after things and we had paid [1204] in our money, and I think he sent for me and I went up to his sick bed and he had the formula book, and I brought me a book and I copied everything, word for word, as he give it out, with complete instructions.

Q. 51. What—was the formula for Coca-Cola copied by you at that time? A. It was.

Q. 52. What became of that book, Mr. Mayfield? A. I do not know whatever did become of it, that

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book. It may have been I was—I reckon it was a little book, anyhow, I had copies of it, complete copies either on a book or paper.

After the formation of this partnership the partnership took the name of Pemberton Medicine Co., under that name we manufactured Wine of Coca, Koke, Globe Flower Cough Syrup, the blood medicine, lime juice and ginger, Coca-Cola, Indian Queen Hair Dye, and a short time thereafter the Dr. got up a new remedy called lemon and orange elixir, and we manufactured that also. We were going into business, and did not know which was best, and we made a stock of all, we had the money to do so. After the formation of the partnership I made the Coca-Cola syrup. When I made up my first batch of Coca-Cola syrup Dr. Pemberton was there telling me, I had to do all things, and he would stand around and tell me how to do those things. When I went down to his place 107 Marietta street [1205] and during the time I was there no one else was connected with Dr. Pemberton. I did see his son later on. Nobody by the name of Lowndes or Venable was around that place then, no one by the name of Walker or Mrs. Dozier was around there. No one else was at that time manufacturing or selling Coca-Cola so far as I know. Dr. Pemberton never told me at that time nor at the time I entered into the written contract of partnership that he had sold Coca-Cola to anybody.

Mr. HIRSCH.—I object to anything that Dr. Pemberton said, and move to strike the answer.

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Objections overruled and appeal prayed and granted.

I never had any knowledge or information of any kind that anyone else, or anybody had any claim, right, title or interest in the product Coca-Cola, or the business of manufacturing or selling anything connected with the trademark Coca-Cola. When we left 107 Marietta St., and went down to S. Pryor St., we moved everything "lock, stock and barrel." Doctor had a very large percolating tank for his Wine of Coca, it was ten or twelve feet high, and he had a big counter with holes in it to receive his percolators. We carried that along, and the percolators to percolate the coca leaves, we moved our manufactured stock—manufactured and on hand, labels, books, kettles for making Coca-Cola and everything that was there. I attended to moving the stuff myself, it was my business to look after that. We moved to S. Pryor St., on the corner of Hunter. We continued to manufacture and sell Coca-Cola syrup under that name, for two or three months. After we began to manufacture this Coca-Cola syrup, we sold it. The trade was small. I do not suppose we ever shipped any in the beginning over five gallons, some gallon jugs, and the five-gallon kegs was the most sizes that we put it in then. We might have shipped sample quart bottles or something like that to good people, considered that was more of a gift than anything else, a sample, in the bottle of syrup. We put labels on these containers to indi-

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cate the contents of them, it had a label Coca-Cola. (Defendants' Exhibit #21, being a photograph and certified copy by the Patent Office of two letters, dated March 8, 1888, from the Pemberton Medicine Co., to the Commissioner of Patents and signed by A. O. Murphey). That is the first letter-head we got up. Mr. Bloodworth, [1206] who had been the cashier for the bank, we considered knew more about getting up a neat letter-head than we did, and we instructed him to get up a nice letter-head; of course, there is several things left off of there, a thing we valued most was our blood medicine, he could not mention them all without making a mess of it, I reckon, as he figured it, Coca-Cola happened to be one among the others which were left off. At that time the Coca-Cola business was small, then too, it was an off season, January, in the winter months is not a good soda-water month. We did some little business, we were advertising and pushing things we thought were in season. Mr. Murphy turned over to me at one time some correspondence addressed to him purporting to be from Dr. Pemberton. That was some time last year, 1914, after these suits were filed against me by the Coca-Cola people. I turned over all the correspondence he gave me to you, I turned over all I received. One of these letters is started and it is just the first page of it, the rest of it is missing. (Exhibit #19.) I do not know what became of the rest of that letter, it was not turned over to me. I sent you everything I received from Mr. Murphy. (Exhibit #16.) The letters I re-

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ceived back there were on stationery of that kind with that letter-head, it was this letter-head, the same kind. After we had manufactured and sold Coca-Cola for two or three months Dr. Pemberton stated to us one day that he had decided to give Coca-Cola to his son. Not the entire business, just Coca-Cola.

Q. Now, did he tell you that he had given—

Mr. HIRSCH.—I object to that form of a question. Let the witness tell if he is going to be examined, don't you tell him, and it is hearsay.

Objection overruled and appeal prayed and granted.

A. I said that he did.

Mr. HIRSCH.—I object to what Dr. Pemberton said as being hearsay.

Mr. LITTLETON.—Go ahead and answer the question. He said, and in fact I knew he had been having trouble with his son, he was an unruly bad boy, and he reported to us that he would have to give it to him to keep peace in the family, but we did not agree, this was after I bought a fourth interest in Coca-Cola, after we had been manufacturing and selling and going around satisfied with the business. The old Dr. was sick and kept fretting around about it and said it was [1207] not of much value, and did not think it had been very long on the market; we had the same formula and could go on and make the same goods under some other name and he would appreciate it, and he would let his son have it. The other partners and I did not agree to any sale or

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assignment of the business of manufacturing and selling Coca-Cola or the trademark, goodwill or anything connected with Coca-Cola, to anybody. We went ahead and sorter accepted the situation in a way, we never did sign up any agreement, we tried to have peace in the family if we could, and we discussed among ourselves what to call our Coca-Cola and agreed upon the name Koke. Prior to the time we agreed upon the name Koke, I never heard of it as a beverage, in fact Coca-Cola was not known so far as that is concerned but very little. I would not say who suggested the name Koke. No other soda-water, or cola drink or beverage had been sold prior to that time under the name of Koke. The product Coca-Cola, prior to the time that we adopted the name of Koke, never had any nicknames applied to it by the public. It was not old enough to have a nickname; it did not have a name of its own up to that time. Coca-Cola was not a well-known article at that time. At that time I had never heard of Koke, we adopted it on account of its being new and the coined word, that is it, that is an easy word, short. It was something new, the others had never heard of it.

Mr. HIRSCH.—We object to what the witness says the others had not heard of. It is at most incompetent testimony.

Objections overruled and appeal prayed and granted.

We used a label to designate the goods, of course,

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and placed on the label, Koke, spelled k-o-k-e. The product was no different from the product Coca-Cola, there was no difference between the product which we thereafter labeled Koke and Coca-Cola. We continued to manufacture Koke by the same formula that old Dr. Pemberton turned over to us as the Coca-Cola formula. After we had changed the name of this product from Coca-Cola to Koke we received orders from our older customers for Coca-Cola, we shipped them Koke and wrote them a nice letter and explained the situation and conditions, which were always satisfactory. I never heard any complaints. (Defendants' Exhibit #23, page 1 of which seems to be a label of Pemberton's French Wine of Coca). That is the label with which [1208] the French Wine of Coca was labeled. After we had adopted and applied this name Koke to our product the partnership as then organized continued up to about, I believe some time in June, Mr. Murphy withdrew. Exhibit #22 is an agreement whereby we agreed to let Mr. Murphey withdraw from the partnership, we all signed that. That is my signature, those are the signatures of the other parties. I recognize them as the genuine signatures. Exhibit #22 correctly sets forth the agreement we entered into at that time. After the retirement of Mr. Murphy we continued the business as a partnership, us three, instead of four, Mr. Murphy had withdrawn, Mayfield, Bloodworth, and Pemberton. We continued to manufacture and sell

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Koke. After Dr. Pemberton died, Mr. Bloodworth and I had a conference with Mrs. Pemberton. Of course we had to come to some kind of agreement, and as before stated we did not care to go on with the partnership and we wanted to divide up. She took the Indian Queen Hair Dye and what manufactured stuff we had of that kind and what material we had, bottles and things, in the settlement; we had quite a lot of manufactured goods, we gave her a third interest, a third of what we had on the floor. We continued to do business after Mr. Murphy retired under the name of Pemberton Medicine Co., the same name. We continued to manufacture and sell Koke up until the death of Dr. After Dr.'s death I do not know that I took it myself, but I sent it up there to the store of Asa G. Candler for Mrs. Pemberton. I presume, I have a faint recollection of going along with the draymen. That was her one-third of the manufactured medicine. There was no Koke in that batch. After that Mr. Bloodworth and I continued in business, we had a good stock on hand and did not manufacture any more except Koke. He and I went on as partners. He and I owned the business equally. Mrs. Pemberton did not get any interest in Koke or Koke formula. Mr. Bloodworth and I continued to manufacture and sell Koke until 1895, right after the Cotton States Exposition, after the fair there, 1895. And then I bought out Mr. Bloodworth. I do not remember what I paid him for his interest. We had a good many accounts on the book from the [1209] sale

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of our patent medicines. He had collected those up and in the settlement those were considered. I do not think he paid me anything, and I do not remember how much I paid him over and above them. After the retirement of Mr. Bloodworth, I continued to manufacture and sell Koke in Atlanta, until the latter part of 1898, about Christmas I left there. The kegs for shipping the Coca-Cola syrup back in the early part of 1888 were painted red. After that we painted them red, always painted them red. No other color besides red. We manufactured and sold this Koke in Atlanta, up to 1898, we put labels on the containers, Koke was on the labels. After I left Atlanta I went to Boston. I stopped in Jersey City, my son preceded me a little, and we looked up a cheap place. I did not know how long I would be in Boston and did not want to leave my son alone in Atlanta. I went over there one or two Saturday nights and spent Sunday with him. We did nothing there to amount to anything, just happened to be there, just a small link in the chain, and I mentioned it. The four members of the Pemberton Medicine Co., Mayfield, Bloodworth, Murphey and Pemberton applied for a corporate charter under the state of Georgia. Defendants' Exhibit #62 is a certified copy of that charter we took out. We never organized under that charter. After I had bought out Mr. E. H. Bloodworth I continued and continuously manufactured and sold Koke up to the organization of the Koke Co., of America. I have sold it in re-

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ceptacles labeled with the name Koke during all of that time, sometime stenciled. I guess you would call that a label. When I went to Shreveport I organized a Koke Co. there, the same was the Koke Co., Ltd., I believe. When that company was organized I did not sell them the business and goodwill of manufacturing and selling Koke and the trademark et cetera. Paper marked Defendants' Exhibit #63 is the charter of the Koke Co., of America. I sold the Koke Co., of America all my interests in everything I had in the Koke business, the trademark I have described, formulas and everything of every nature and character pertaining to Koke, the Koke Co., of America is still the owner of that. After the organization of the Koke Co., of America and the sale to it of Koke I had the trademark Koke registered in the [1210] Republic of Mexico. Paper marked Defendants' Exhibit #64—that is the certificate of registration. It is in Spanish if you can read it, it is in October 14th, I can read that much of it, the balance of it I cannot read. I had the trademark registered in the Dominion of Canada, that is, the Koke Co., of America had it registered in the Dominion of Canada. Exhibit #65 is the certificate of registration in the Dominion of Canada, dated the 4th day of March, 1913, I think. The Koke Co., of America has continuously owned the Koke business and the trademark Koke from its organization down to date. The Koke Co., of America sell to their agents, give them license to do business in a certain

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territory. The Southern Coke Co., Ltd., is just an agent to the Koke Co., of America, a selling agent. The Koke Co., of America, grant the Southern Koke Co., Ltd., a license to sell its Koke and use its trademark Koke in connection therewith. I will get that license and produce it as an exhibit to my deposition. And the Koke Co., of Texas, all the same are licensees for certain territory. I was in Atlanta in August 1, 1899, when Mrs. J. S. Pemberton signed a certificate of some sort. Mrs. Pemberton, on Aug. 1, 1899, in Atlanta, Ga., did sign this certificate (Defendants' Exhibit #66) which reads as follows: "To whom it may concern: This is to certify that my husband Dr. J. S. Pemberton was the originator of the formula for making "Coca-Cola," "Wine Coca," and other similar fount beverages; that Mr. J. C. Mayfield of Atlanta, was associated with Dr. J. S. Pemberton long before and up to the time of his death, and it was under my husband's own personal supervision and instruction that Mr. Mayfield was taught to manufacture these and other similar specialties. To my personal knowledge, Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca companies were formed, and he has been at the head of the manufacturing dept. of one or the other of those companies ever since their organization. It is undoubtedly true that he is today the oldest and most efficient and experienced living man in the manufacture of those specialties

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and the most reliable expert on the subject."

Signed: Mrs. J. S. Pemberton.

Q. Were you present when that certificate was signed? A. Yes, sir. [1211]

Mr. HIRSCH.—We object to that due to the fact that the witness saying so is hearsay, and Mrs. Pemberton saying it is so will be hearsay too. We have not the right to cross-examine the person who made the affidavit and we therefore ask that the entire question and answer be ruled out; in addition the witness appears to read from a printed copy.

Objections overruled and appeal prayed and granted.

Mrs. Pemberton turned the original certificate over to me after she signed it. It must have gotten lost at some of the printers I had some of these things printed. I did keep it for quite awhile, carrying it from place to place.

Mr. HIRSCH.—We object to that testimony on the ground that if he had original affidavit here it would not be competent testimony.

Objection overruled and appeal prayed and granted.

This printed copy is an exact copy.

Mr. HIRSCH.—We object to that as being irrelevant testimony, and it makes no difference whether it was an exact copy or not and move that the question and answer be stricken for incompetency.

Objection overruled and appeal prayed and granted.

A paper marked Defendants' Exhibit #67 is the

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assignment from the Murfreesboro Bottling Works to the Koke Co., of America, dated 28th day of November, 1911, and is the assignment for their registered trademark Koke.

Q. Before I leave this affidavit, state whether or not Mrs. Pemberton, the wife of Dr. J. S. Pemberton did in fact make the statement and declaration contained in that certificate on the 1st day of Aug., 1899, in Atlanta, Ga.

A. She did.

Mr. HIRSCH.—We object on the ground heretofore stated in regard to this affidavit and move that the question and answer be stricken.

Objection overruled and appeal prayed and granted. Defendants' Exhibit #28 is an assignment from the Birmingham Bottling Works to Mayfield & Mayfield of the trademark Dope and the business and goodwill connected therewith, dated May 6, 1913. Defendants' Exhibit #32 is a bill of sale and assignment of the trademark Dope and the business and goodwill connected therewith from Steve T. Mayfield and James C. Mayfield, trading as Mayfield & Mayfield, to the Koke Co., of America, dated the 26th day of December, 1913. That is [1212] my signature. After the assignment of this Dope to the Koke Co., of America, the Koke Co., of America, thru its agents, licensees, began and continued to sell Dope continuously. They affixed the name Dope to the packages and receptacles containing the product. They have continued up to the present time. A paper marked Defendants' Exhibit #68 is a certified copy.

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of the testimony in behalf—of Benjamin Kent, in a proceeding in the United States Patent Office styled: H. C. Beerman, vs. Coca-Cola Co., interference #16,753.

Mr. HIRSCH.—You are just identifying these are you not, Mr. Littleton?

Mr. LITTLETON.—Yes, sir.

Mr. HIRSCH.—It may be shown that they are just being identified but not offered at this time. Defendants' Exhibit #69 is a certified copy of the testimony in behalf of the Coca-Cola Co., in the same case. Paper marked Defendants' Exhibit #70 is a certified copy of the opinion of the examiners of interferences in that same cause. I have not any of the old books or records of our business away back from the beginning up to date. All my old papers and records, et cetera connected with my Koke business were destroyed in Birmingham. There was a fire on first avenue back of the store, that backed in and got into our store on Morris Ave., on the back side and got into our old books and papers and we lost them in the fire. That was in 1907 or '8. We have advertised this product Koke. We have done a lot of all kinds of advertising. A calendar marked Defendants' Exhibit #71 is a specimen of the advertising of Koke. I could not say how many of those calendars we sent out but several thousand, though. A sign marked Defendants' Exhibit #72 that is another specimen of advertising of Koke. A hanger marked Defendants' Exhibit #73 is another specimen of advertising of Koke. A calendar marked

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Defendants' Exhibit #74 is another specimen of Koke advertising. Another calendar marked Defendants' Exhibit #75 is another specimen of Koke advertising. Another calendar marked Defendants' Exhibit #76 is another specimen of Koke advertising. Another calendar marked Defendants' Exhibit #77 is another specimen of advertising of Koke. A blotter marked Defendants' Exhibit #78 is another specimen of Koke advertising. A tin sign or hanger Defendants' Exhibit #33 is another specimen of Koke advertising. A shipping tag, Defendants' [1213] Exhibit #79, is a specimen of the shipping tag which we label Koke Barrels and Kegs containing Koke. A blotter marked Defendants' Exhibit #80 is another specimen of advertising Koke. Another blotter labeled Defendants' Exhibit #81 is another specimen of the advertising of Koke. A A celluloid card marked Defendants' Exhibit #82 is another specimen of Koke advertising. A card marked Defendants' Exhibit #83 is another specimen of Koke advertising. A black cap Defendants' Exhibit #39 is another specimen of Koke advertising. A celluloid card or hanger marked Defendant's Exhibit #84 is another specimen of Koke advertising. A rubber apron marked Defendants' Exhibit #85 is another specimen of Koke advertising. A fan marked Defendants' Exhibit #86 is another specimen of Koke advertising. A fan marked Defendant's Exhibit #87 is another specimen of Koke advertising. Another fan marked Defendants' Exhibit #88 is another specimen of

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Koke advertising. A countersign marked Defendants' Exhibit #90 is another specimen of Koke advertising. A knife marked Defendants' Exhibit #91 is another specimen of Koke advertising. A card marked Defendants' Exhibit #92 is another specimen of Koke advertising. A blotter marked Defendants' Exhibit #93 is another specimen of Koke advertising. A card marked Defendants' Exhibit #94 is a ticket which is good for a glass of Koke at a soda-fount, or a bottle, a free ticket we call them. We use them for advertising. I would not say when they were printed, exactly. We have been having them ever since they have been out, but that ticket may have been printed here. When they would get old or dirty we would burn them. Of course when we redeemed them or they were sent back we would have fresh ones printed. When they were printed we sent them out sometimes to our customers to hand out and sometimes to our traveling, who would distribute them. A card or ticket marked Defendants' Exhibit #95 is a calendar with free ticket attached sent out by the Dallas office of the Koke Co., of Texas. This is a calendar for 1912, this was gotten out evidently in 1911 ready to be distributed in 1912. A calendar Defendants' Exhibit #41 is another specimen of Koke advertising, this is a 1915 calendar, we are just getting them out. Another 1915 calendar [1214] marked Defendants' Exhibit #96 is another specimen of Koke advertising. A blotter, Defendants' Exhibit #97, is a specimen of Dope advertising. Another blotter,

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Defendants' Exhibit #98, is another specimen of Dope advertising. A cardboard hanger, Defendants' Exhibit #99, is another specimen of Dope advertising. Another card marked Defendants' Exhibit #100 is another specimen of Dope advertising. A calendar marked Defendants' Exhibit #101 is another specimen of Dope advertising. A calendar marked Defendants' Exhibit #102 is another specimen of Dope advertising. A calendar marked Defendants' Exhibit #103 is another specimen of Dope advertising. Another calendar marked Defendants' Exhibit #104 is another specimen of Dope advertising. Another calendar marked Defendants' Exhibit #105 is another specimen of Dope advertising. A calendar marked Defendants' Exhibit #106 is another specimen of Dope advertising. Another calendar, Defendants' Exhibit #107, is another specimen of Dope advertising. Another calendar, Defendants' Exhibit #108, is another specimen of Dope advertising. A calendar, Defendants' Exhibit #109, is another specimen of Dope advertising. Another calendar marked Defendants' Exhibit #110 is another specimen of Dope advertising. A large wagon umbrella, Defendants' Exhibit #111, is another specimen of Dope advertising; we had the same umbrella with Koke on them where Dope appeared here. A rubber apron, Defendants' Exhibit #112, is another specimen of Dope advertising. A ticket, Defendants' Exhibit #113, is a ticket which entitles holder to a glass of Dope, or bottle, any of our customers, that was sent out to our trade

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and traveling men to be redeemed by us at five cents each. Another blotter, Defendants' Exhibit 114, is another specimen of Dope advertising. Another blotter marked Defendants' Exhibit #115, is another specimen of Dope advertising. "The Southern Carbonator and Bottler," a magazine purported to be published in Atlanta, Ga., dated Dec. 5, 1914, Defendants' Exhibit #116, on page 163, is some more advertising of Koke and Dope. The older journals, we had here had our ad. in them and they have been misplaced, I just happened to have some of the recent issues. A copy of the "National Bottlers Gazette," a magazine published in New York, dated Nov. 5, 1914, on page [1215] 195 (Defendants' Exhibit #117 is some more advertising of Koke and Dope. A book called Adallis' Creed-American Merchants' Guide, 1913-1917, of Texas (Defendants' Exhibit #118) are some more of the Koke advertising. We have advertised continuously right along, and just happened to have a little of this left over, in the past. We have had *large* outdoor signs than we happen to have here, then we have had some banners sometimes tacked up, we have had almost every kind of advertising, I mean sold to this class of business. We have continuously advertised Koke from the time I began to make it up to date. All this advertising we had printed we sent out to our trade, and traveling men, and they tacked it up. We sent this advertising mostly in the southern states, our trade has been largely in the Southern States, but we have had customers outside the South-

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ern States. I have always felt that I have spent something like seventy-five or one hundred thousand dollars for advertising outside of 26 years of my time and that of my boys. We have never drawn a salary and what we made outside of what we need went to advertising our goods. I have advertised commensurate with my business; in other words, I did not have the money to push my business all over the country at once. This is not all the kinds of advertising I have put out. We had some match boxes, too, I do not see any here, that we distributed quite a good deal of and some little trays, of course we would buy this stuff for advertising purposes and send it out until it is fortunate we have got this much, but we sent it out as we got it. It is pretty hard to remember all those advertising novelties.

**Deposition of J. C. Mayfield, Jr., for Defendants
(Recalled).**

J. C. MAYFIELD, Jr., a witness produced by the defendants in the above-entitled causes, being recalled for further examination, deposes as follows:

Redirect Examination.

Those are the letters I referred to this morning.

Recross-examination.

What I told the salesmen, when I went out, I told you I had copies of the letters. That is my answer to the question, though, and here is the Pemberton certificate. That is one of the letters I had reference to in my answer, one of the many. [1216] That is the only one I made an effort to find. I found

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the first and I came back and quit looking.

Mr. HIRSCH.—This is a letter produced by the witness J. C. Mayfield, Jr., in response to our request that he file the letters of instructions to his salesmen and which is offered as Exhibit #20 to complainant's testimony.

**Deposition of J. C. Mayfield, Sr., for Defendants
(Recalled).**

J. C. Mayfield, Sr., being recalled for further examination, deposes as follows:

Direct Examination (Continued).

A Koke label, marked Defendants' Exhibit #119, is one used by the Koke Co. of Shreveport, La., is one of the labels with which we labeled barrels containing Koke syrup. A proof of a similar label, in red, white, and black (marked Defendants' Exhibit #120) is a proof of one of the labels that was used by the Koke Co., of America. These were printed and we would trim them around with the scissors, this happened to be one that was not trimmed. Defendants' Exhibit #121 is a label for the jugs, also a label that we attach to each and every invoice that goes out which states there are so many gallons. A label marked Defendants' Exhibit #122 is some labels I had printed myself for the office here. I do not know whether it was ever used or not. A label marked Defendants' Exhibit #123 is a Koke label and was used by the bottlers of Koke, that is the label we are using now. Defendants' Exhibit #124 is a shipping tag that we sometimes put on

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the small kegs, as well as barrels. We as a rule stencil them and then mark them, to be on the safe side, of it being delivered to the consignee. Defendants' Exhibit #125 is another Koke label. I found this label in the store here when I came to take charge. That was one that had been used by the office here before I came to take charge, perhaps put on the soda water. We have had various sizes and kinds of labels and have not adopted any particular size or shape. I have not any of the old labels which I used in Birmingham. After I came to New Orleans and took charge of the Southern Koke Co., I found some labels, these blue labels Exhibit #125, and I immediately discontinued their use, and had my men take them up wherever they could find them, I had new ones printed, Exhibit #123, and I sent those out to [1217] my trade and told them to use them instead of the other number. This product Koke has always been the same color from the time we began to make it up to the present time, and had the same taste substantially.

J. C. MAYFIELD, Sr., being recalled for further examination, deposes as follows:

Direct Examination (Continued).

I purchased something from W. L. Bidding of Sherman, Texas. A paper marked Defendants' Exhibit #126 is an assignment of the trademark, business, goodwill, et cetera, of W. L. Bidding's business, that correctly states what was assigned to me. A paper marked Defendant's Exhibit #127 is a certificate from the patent office of the registration

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of the trademark Koke in the name of W. L. Bidding, of Sherman, Texas, and that is what it purports to be, and what I bought of Mr. Bidding. A paper marked Defendants' Exhibit #128 is a certificate of registration of the name of Koke, of the trademark Koke registered by W. L. Bidding and registered in the name of the Koke Company of America as assignors of W. L. Bidding, this is the paper we received from the Patent Office. Mr. Bidding filed an application to switch his trademark or registered label there to a trademark. We had some proceedings in Washington, I filed an interference, but after it was filed I went back to Dallas, Texas, and to Sherman and saw Mr. Bidding and I realized he had done some advertising and popularized Koke a little bit in his section and it was the cheapest way out and I thought the most satisfactory for me to deal with him and so made a deal with him and bought out his interest. A paper Defendants' Exhibit #129 is a certificate of registration of the trademark Koke, registered in the name of the Murfresboro Bottling Works, that is the paper turned over to me, that I bought from them. A paper marked Defendants' Exhibit #130 is a certificate of registration of the word Koke, as a trademark in the State of Oregon, registered in the name of the Koke Company, Limited, of Shreveport, Louisiana, that is the registration of the trademark which I procured in that State. A similar document for the State of California is marked Defendants' Exhibit #131. I can identify that as the regis-

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tration. [1218] A certificate of the registration of the trademark Koke for the State of Colorado marked Defendants' Exhibit #132. I can identify that as the registration from that State. Another document being a certified copy of the registration of the trademark Koke under the law of the Territory of New Mexico (Defendants' Exhibit #133) I can identify as being the registration from that state. Another document, Defendants' Exhibit #134, is a certificate of the registration of the trademark Koke under the laws of the state of Utah, I can identify that also. Another one, marked Defendants' Exhibit #135, is a certificate of registration of the trademark Koke under the laws of the territory of Arizona, I can identify that also. Another paper, Defendants' Exhibit #136, is a certificate of the registration of the trademark Koke under the laws of the state of Tennessee. Another, marked Defendants' Exhibit #137, is a certificate of registration of the trademark Koke under the laws of the state of Minnesota, I can identify that. Another, marked Defendants' Exhibit #138, is a certificate of the registration of the trademark Koke under the laws of the state of Michigan, I can identify that. Another, marked Defendants' Exhibit #139, is the certificate of registration of the trademark Koke under the laws of the state of Texas, I can identify that. Defendants' Exhibit #140 is a certificate of the registration of the trademark Koke under the laws of the state of Missouri, I can identify that. Defendants' Exhibit #141 is a certificate of

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the registration of the trademark Koke under the laws of the state of Oklahoma, I can identify that. Another, marked Defendants' Exhibit #142, is a certificate of the registration of the trademark Koke under the laws of the state of Indiana. Defendant's Exhibit #143 is a certificate of the registration of the trademark Koke under the laws of the state of Louisiana. Another one, marked Defendants' Exhibit #144, is a certificate of the registration of the trademark Koke under the laws of the state of Illinois. Another one, marked Defendants' Exhibit #145, is a certificate of registration of the trademark Koke under the laws of the state of New Jersey. Another, marked Defendants' Exhibit #146, is a certificate of registration of the trademark Koke under the laws [1219] of the state of Kentucky. Another, marked Defendants' Exhibit #147, is a certificate of registration of the trademark Koke under the laws of the state of Georgia. A similar document, marked Defendants' Exhibit #148, is a certificate of registration of the trademark Koke under the laws of Florida. Defendants' Exhibit #149 is a certificate of the registration of the trademark Koke under the laws of the state of South Carolina. Defendants' Exhibit #150 is a certificate of registration of the trademark Koke under the laws of the state of North Carolina. Another, marked Defendants' Exhibit #151, is a certificate of registration of the trademark Koke under the laws of the Commonwealth of Pennsylvania. Defendants' Exhibit #152 is a certificate of the registration of the

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trademark Koke under the laws of the state of Texas. Defendants' Exhibit #153 is a certificate registration of the trademark Koke under the laws of the state of New York. Another similar document (marked Defendants' Exhibit #155) is a certificate of the registration of the trademark Koke under the laws of the state of Nebraska. I secured the trademarks in the same name of the Koke Company of Shreveport with the understanding that they were to assign them back to me, and they did a short time after we got them. They were my trademarks and my business and I just took them out in the name of the company. These assignments of the trademark Koke et cetera, from the Koke Company, Limited, of Shreveport, Louisiana, back to me dated the 20th day of November, 1910, are the assignments back to me of the trademark of said registrations heretofore identified (Exhibit #156) these assignments are genuine and what they purport to be and are duly signed by the president of the company and attested by the secretary and the company was duly authorized to make those assignments at the time they were made. After the Koke Company of Shreveport went out of business, their business, goodwill, et cetera, was all assigned to me. I was the principal owner, stockholder of the Koke Company of Shreveport. A fan, marked Defendants' Exhibit #157, is another specimen of Dope advertising. Defendants' Exhibit #158 we attach to invoices, as they would go out. When the goods were shipped we attached that to the [1220] in-

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voice. A copy of the Southern Carbonator and Bottler of April 5, 1914, published in Atlanta, Georgia, marked Defendants' Exhibit #159, on page 92 of that publication is some more Koke and Dope advertising. It is a page of advertising. A sign, marked Defendants' Exhibit #160, is another specimen of Dope advertising. It is one of our signs, paraffin signs, marked Defendants' Exhibit #161, is another specimen of Koke advertising. Another copy of the Southern Carbonator and Bottler, marked Defendants' Exhibit #162, dated February 5, 1915, on page 91 of that publication is another specimen of the Koke advertising. A copy of the National Bottlers Gazette of April 5, 1914, marked Defendants' Exhibit #163, on page 58 is some more advertising of Koke and Dope. A ticket, marked Defendants' Exhibit #164, is a ticket that is good for a glass of Koke at the soda-fount or a bottle of it. The holder of it can get a glass by presenting the ticket. We used this in 1910 and '11 in Ft. Worth and Shreveport and other places I do not know; we sent it out promiscuously. A label, marked Defendants' Exhibit #165, is a label of our Dope, we used that. It was used on the soda-water bottles exclusively. A statement on the billhead of the Center Van Horn, Ltd. (marked Defendants' Exhibit #166), shows various items of advertising that were purchased and the amount paid for them that is a correct statement of the items purchased. That is one of the invoices we received. A statement dated September 1st, 1914, marked Defendants' Exhibit #167, is a bill from

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J. G. Wallister, for fans and caps, the Southern Koke Company purchased those articles. The Southern Koke Company, Limited, purchased the advertising on Exhibit #166. Another statement from J. G. Wallister, marked Defendants' Exhibit #168, is a statement representing the purchases actually made by the Southern Koke Company and is just what it states there, balance due on caps, and this other down there is a pencil memoranda showing goods bought in 1914, July 9th and August 21st. In another statement from the same company, marked Defendants' Exhibit #170, the articles mentioned therein were purchased by the Southern Koke Company, Ltd., and paid for about the date of that statement. In another statement from the [1221] J. G. Wallister Co., marked Defendants' Exhibit #171, the articles mentioned in that statement were purchased and paid for in this statement. The caps are caps that we gave to boys and advertising memoranda to wear on the head. All of it was advertising matter. At the time I instructed the bottler in New Orleans to discontinue the use of the label which consisted of a yellow label with Koke printed on there in red. As soon as I found out they were using that blue label, of course, I changed it here immediately and I noticed that Mr. Moore, W. McCarty Moore's name was on it, it occurred to me that he might be using a similar label in Dallas as he was president of that Dallas office. I wrote him and told him if he was using the label like that, I wanted him to discontinue its use at once and sent

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him a sample of the yellow label I was putting out, and he told me he had given instructions over there—

Mr. HIRSCH.—I will object to anything that anyone said, Mr. Mayfield, as being hearsay evidence.

Objection overruled and appeal granted.

He followed my instructions. I was there a short time afterwards, I think and they had discontinued the use of it. A looking-glass with the quotation “Drink Koke” trademark on it. (Defendant’s Exhibit #172) is another specimen of Koke advertising. A dispensing bottle marked Defendants’ Exhibit #173 is a sample of the dispensing bottle purchased by us and used by the Koke Companies, that was furnished dealers. I did not pick out the design of dispensing bottles, just sent them, that is the local representative of the Illinois Glass Works here, gave him my label and told him I wanted a dispensing bottle one of their regular stock bottles and wanted my Koke on there, and that is the bottle they shipped. That is the cheapest bottle they had.

Q. When you bought that bottle was anything said to you by the representative of the Illinois Glass Works or glass company, about that being a bottle used exclusively by the Coca-Cola Company or whether it was a bottle used generally, or anything of that sort?

A. Used generally.

Mr. HIRSCH.—I object to anything the representative said as being hearsay evidence and move that it be stricken.

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Objection overruled and appeal prayed and granted.

After the completion of the [1222] taking of the complainant's testimony in these cases last summer I received a letter from T. L. Boswell, one of their witnesses and one of their numerous detectives. After I got the letter I mailed it to you Mr. Littleton, at Chattanooga.

Q. Now, I have been looking for that letter I cannot find it. If I find the letter I want you to allow me to produce and file it in this case.

A. I certainly will. A gentleman represented to be G. Walton, called on me in the summer of 1913. He represented himself to be a capitalist. Mr. Cheevers brought him there. Mr. Cheevers evidently from his talk impressed him that Koke was a big thing and he got the idea of investing some money in it, and he brought him down there to talk it over with me. I told him that the New Orleans office did not have any stock for sale. I had taken charge of it and was not going to sell any more stock. I do not remember a detective by the name of George H. Wilkins from the office of Mr. Edward S. Rogers in Chicago. I had my conversation with G. Walton, in our office, 807 Howard Avenue, the Southern Koke Company Limited. There was present during the conversation that I had with this gentleman, Miss E. N. Daly, my wife happening to be in that morning. She was there and a young man that represented a typewriting company here. I have forgotten the name. I had just bought a new type-

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writer from him and he had brought it in. He, my wife, Miss Daly and myself were in front of the office and this capitalist or detective as it turned out to be took our photographs, he had a kodak with him and said he wanted to take our picture. Miss Daly was the stenographer in the office at the time. In the course of the conversation I did not state to this detective that I was not doing any advertising at all. I did not tell him this or anything like it that the Coca-Cola Company had spent millions of dollars advertising and that every dollar they spent helped me sell Koke. I did not tell him that I understood a lot of people asked for Koke when they wanted Coca-Cola but I could not help that. I did not tell him that our bottles and labels were the same as the Coca-Cola and a lot of people thought it was Coca-Cola, or anything like that. I did not at any time call this fellow Cheevers to my office and get him to make a statement [1223] about his connection with the Southern Koke Company Limited. I did telephone him to come to the office that I had a letter from Mr. Scott's brother and I told him what Mr. Scott said, when he would be here. I had written up something for Mr. Cheevers to sign, and while he was there I mentioned that to him. He did not sign it however, he said he would think it over. I actually had a letter from Mr. Scott's brother, I showed it to Mr. Cheevers. He did not deny that the statements which I had written out contained the actual facts, he said he would think it over. He seemed to be a little miffed on account of not being

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on the pay-roll of the Southern Koke Limited, and it seemed that he did not know that they had ever done anything for him and he did not see why he should be doing for the—

Mr. HIRSCH.—I object to what anybody said as being hearsay and move that it be stricken out.

Objection overruled and appeal prayed and granted.

I told him that it just recited facts and there was no reason why he should sign it, I would not force him if he did not want to. I have forgotten exactly when that took place, it seems to me it was the latter part of 1913 or the first of '14, it was after he had severed his connection with us, I believe, it was in 1914, I am not positive about that date. I believe it was after he brought this Coca-Cola detective, G. Walton, *alias* George H. Wilkins, up to our place of business. Defendants' Exhibit #174 is a bottle of Coca-Cola that I bought on the market in a little grocery store, George Jacobs, Howard Avenue and Barrone Streets in the city. I bought that last year in the summer sometime. I identify that as the bottle I purchased, I had the stenographer write that off and signed my name to it as having bought it from George Jacobs. I pasted it on the bottle. Defendants' Exhibit #175 is a bottle I bought at the same place at the same time. Defendants' Exhibit #176 came from the same place at the same time Mr. A. B. Littleton and I went down there together when we purchased them. Defendants' Exhibit #177 is a bottle of Koke, bottled by our bottlers

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here, now since I notice the date on this card this must have been the same and my recollection is that we bought this from Jacobs, well, it is not dated, I sent the young lady stenographer out to buy this while [1224] I went down to buy the other to show the difference in the two packages. That is the style of bottle we used altogether in various places. Defendants' Exhibit #178 is the same thing, same time, and same place. Koke has never been bottled in New Orleans in bottles other than this bottle that I know of. I have never seen or heard of Coca-Cola being sold on the market in New Orleans, in this territory in any splits bottles similar to Exhibits #177 and 178. The bill of complaint in this case makes the Koke Company of Arkansas, a defendant. A charter was taken out for a corporation of that name, under the laws of the state of Arizona. It was not a going concern but we did organize. We may have manufactured or sold a little bit of Koke or Dope but not very much. That corporation is not now in existence. The Koke Company of Oklahoma, I do not believe, was ever organized. The Texas office secured that state and was going to put an office in the state. I believe they were going to secure a charter, in fact, I know they did. They may have held a meeting and organized but I have no recollection of any stock being issued because they decided afterwards that we would supply the Oklahoma territory from the Dallas office. That corporation is not in existence. No company in which I am interested or connected ever had a

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place of business for manufacturing our product at Pine Bluff, Arkansas. Neither of our products K-o-k-e or D-o-p-e was ever manufactured at Pine Bluff, Arkansas. I have heard there was a Pine Bluff Bottling Works.

Mr. HIRSCH.—I object to what he has heard as hearsay testimony and move to strike.

In fact I have seen some of their labels, C-o-k-e, Coke. I have no connection with that concern whatever. None of our companies had any connection with them. This Central Koke Company of Chattanooga, Tennessee, is the agent to the Koke Company of America, selling agent, licensees, they get their extract for making their syrup from St. Louis, Van Dusen, I mean to say. We had some trade all over Texas for Celery-Cola at the fountain, in Dallas and other places and my traveling men informed me—

Mr. HIRSCH.—I object as hearsay to anything that he was informed by his traveling men and move that it be stricken.

Objection overruled and appeal prayed and granted.

Mr. LITTLETON.—Go ahead.

That some of our customers, the reason they were not buying, of course, we were building [1225] and did not have so much trade in the beginning that they were serving the Coca-Cola or whatever Cola beverage they had and dashing a little celery in it to give it a little celery flavor. I went myself to the Owl Drug Store in Dallas, Texas, who I knew did not buy any Celery-Cola, and told him to give me Celery-

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Cola. He gave me a Coca-Cola and dashed a little celery in it and dashed a little too much and made it a very objectionable drink. There are a great many other cola drinks besides our Koke and Dope on the market to-day to my knowledge. I know of quite a number and have heard of at least a couple of hundred.

Mr. HIRSCH.—I object to what he has heard and move to strike as hearsay.

Objection overruled and appeal prayed and granted.

I can enumerate some. There is Wine Cola, Eli-Cola, Wise-Ola, Afri-Cola, Konut, Coca-Nola, Pepsi-Nola, Lemon-Ola, Cherro-Cola, Nifti-Cola, True-Cola, Cola-Nip, Star-Cola, Diehls Cola, no, not Diehl's,—Gerst's Cola, and Mar-Cola, Farri-Cola, Luck-Ola, Mint-Cola, Lime-Cola or Lime-Ola, I do not know which Wine Cola was a soda-fountain syrup since 1893. All these different beverages I have mentioned are all the same color. I have drank a good many of them. Some of them have a little different taste, it is a pretty hard matter but of course the difference comes, the same piece of goods will vary in flavor but you might say they are all uniformed flavor, some little variation on account of age, maybe. The color of all these beverages are about the same as our product Koke and Dope. I never saw a cola beverage that was not the same general color, or the same general taste. I painted our barrels red because that is the color that Dr. Pemberton used, we naturally took over that color, and

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further for the fact that it is the cheapest paint you can buy and one coat is sufficient for painting a barrel, there is no reason why we should change. The cola drink manufacturers paint the barrels and kegs containing their syrup red except, the Gay-Ola; in the last year or two I notice their's is a little different color, I have seen one or two possibly, but all the rest are red packages and containers. (A number of crowns used on various cola beverages, Exhibit #179.) I have seen this Cola-Queen, I would not say for sure, about the Arrow-Cola; I have seen this Cola-Queen, this Pepsi-Cola, [1226] I have seen Coca-Cola, and I have seen the cola and I have seen Koke. And Cherro-Cola, I have seen the Ali-Cola, I do not remember about the Candy Cola, Cola-Nip, I have seen that. Rye-Ola I have seen; Peach-Ola, I do not believe I have seen. Gay-Ola, I have heard of that; Mint-Ola, I am not right sure about seeing it; or the Cola Queen, I have seen Luck-Ola. I do not know about that Pure Cola, but I do not remember seeing the goods put up, I do not remember Carson's Cola, I remember the Celery Cola and of course the sarsaparilla. We have tried to keep the shade of red we have painted our barrels from time to time uniform, there might have been a little variation but nearly always the same color, uniform red. Neither when I was in business for myself, nor since I have become the executive officer of various corporations ever instructed at any time our salesmen to sell Koke and Dope, as and for, Coca-Cola. I told them always to sell our goods on its merits, talk it and push

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it and I contended we had the best goods on the market and never to offer as a substitute or advise anyone else to, because I was advertising and pushing my own product. If any one ever did sell Koke and Dope as and for Coca-Cola or substitute it for Coca-Cola, it was not done with my consent and knowledge, acquiescence and approval. A printed Patent Office copy of the certificate of registration of the Trademark Steiger's Cola, Malted Tonic, Defendants' Exhibit #180, is what it is.

Mr. LITTLETON.—I now tender and offer in evidence on behalf of the defendants in the above-styled case or cases mentioned in the caption, all exhibits identified by the witness on his direct examination beginning with #61 and numbered consecutively down to and including Exhibit #180.

Mr. HIRSCH.—I object to the entering of exhibits, in bulk, because there are 103 exhibits, and I wish to object to some of them but I cannot unless there is a stipulation that I can object to those later.

Mr. LITTLETON.—You can take advantage of that and object any time you want to.

Mr. HIRSCH.—That is all right.

Mr. LITTLETON.—And if the witness has identified any other exhibits not included in these numbers heretofore offered they are offered in the same manner.

Mr. HIRSCH.—Yes, sir; it is understood on the record that [1227] the right to object is specifically reserved.

Mr. LITTLETON.—Yes, sir, I also want to tender

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and offer in evidence at this time the exhibits beginning with #55 and ending with #60 and all other exhibits identified by the witness J. C. Mayfield, Jr., on his direct examination as evidence on behalf of the defendants in the above-entitled cause.

Mr. HIRSCH.—We reserve the same right to object to each and every and all of the exhibits tendered.

Mr. LITTLETON.—There was one more question I wanted to ask Mr. Mayfield, I was about to overlook.

Mr. HIRSCH.—Now, Mr. Littleton, it is understood about that reservation now.

Mr. LITTLETON.—Yes, sir.

Mr. LITTLETON.—That is in the agreed order, anyhow, that you can make any objection at the hearing to the irrelevancy or incompetency.

Q. Mr. Mayfield, Mr. Asa G. Candler testified that you called on a man by the name of Mr. W. N. Hayne, who was in business in Atlanta, Georgia, and tried to sell him Yum-Yum, that you stated it was made by the Coca-Cola formula and that Mr. Hayne replied to you that he did not want any Yum-Yum, and he required you to sell him Coca-Cola and that he required you to bill your product as such that the witness Asa G. Candler got the bill and then got after you about it and also about another instance of the same kind and that the witness Asa G. Candler—no, that you told Asa G. Candler that you had a barrel of Coca-Cola that you had gotten in exchange for something and that you were selling it out and would

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quit, that you told him, the said Asa G. Candler, that you were not manufacturing it but just got that barrel in exchange; state whether or not anything like that occurred? A. Never.

Cross-examination. [1228]

Q. 433. You stated, Mr. Mayfield, on your direct examination that Doctor J. S. Pemberton made known the formula for Koke or Coca-Cola to me, he got his formula book and called it over to me word for word; when was that?

A. That was in January, just after he had signed the contract.

Q. 434. Of what year? A. 1888.

Q. 435. That was the Coca-Cola formula?

A. It was.

Q. 436. You are sure of that? A. I am.

Q. 437. Absolutely? A. Absolutely.

Q. 438. No possible mistake about that?

A. No, sir.

Q. 439. Now, you stated that he made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it? A. I did.

Q. 441. What was at the top of the page, if anything? A. Just Coca-Cola formula.

Q. 442. Just, "Coca-Cola formula" was at the top of the page, and he read it off to you?

A. He read it off to me and I copied it.

Q. 443. You made a copy? A. I made a copy.

Q. 444. In Doctor Pemberton's presence?

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A. Yes, sir.

Q. 445. And with his consent? A. Sure.

Q. 446. There is no possible doubt about that?

A. No, sir.

I do not know where that book is now. I do not believe I have seen it since that day. He just read it to me and I copied it and then [1229] he read it back to me to see if I had it identical with his copy. The book of Dr. Pemberton's was a small book, a memorandum book. I do not know about the back, it was hinged on the side of the sheet is my recollection. Not the size of a journal page but it opened that way. To the best of my recollection it was a book about 4 by 6.

Q. 462. And you regarded it, and Dr. Pemberton regarded that formula, that Coca-Cola formula as a secret formula? A. Yes, sir.

This was in January and he died that same year, along in the summer. Some time in January, 1888, we commenced making the product according to that formula. We have discontinued the use of coca in our formula, there is no cocaine in it, absolutely no chance for anything to get in there for we do not use coca leaves in any shape. We do not use the extract of coca. There is now no form of the coca leaf connected with the drink at all. The cocaine is left out and we added something in lieu thereof, that has practically the same flavor as the coca leaf. We added Imperial China tea, flavoring extract. That is the only change. Outside of those two changes

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there is absolutely no change from the formula that Dr. Pemberton handed over to me in January, 1888. I made a purchase from the Murfreesboro Bottling Works. I had our negotiations with, I believe, Mr. Hudgings, and his partner was, I think Christian Hudgins. There were two, and one Hudgins I did not get to see was out of the city, but he did join in the transfer. They were bottling soda-waters of all kinds, running an ice plant and coal-yard, is my recollection, making and selling a product which they labeled and sold as Koke. I could not say how large the bottling business was, it was quite an up to date plant, and the ice plant was all connected with it. I was there only one day and did not see them shipping syrup. I do not know whether or not they did ship syrup, they were only bottlers there in Murfreesboro. They had shipping cases, I suppose they were doing a shipping business. Shipping soda-water out of the city. Soda-water business as a rule is necessarily a local business. They called over one or two customers is my recollection, not very many outsiders that they had sold syrup to. I believe one customer was in Kentucky, who had bought Koke syrup from the Murfreesboro Bottling Works. He told me of a customer, it was [1230] not more than one or two and I believe it was a party that he had given permission to use the trademark Koke, I do not know that he sold the syrup. I do not know that he sold him anything, but to my recollection now he gave him permission to use the trademark Koke

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for awhile. I do not remember where the party was. I was only there part of one day, and bought the trademark. I do not think I took over anything but the trademark registration certificate. I omitted the coca leaves out of the formula just after the pure food act went into effect. I added the Imperial China tea just after that. I copied the Coca-Cola formula on, my recollection is it was a memorandum book, about 4 by 5 or 4 by 6. I think it opened on the side, I am not sure, it must have been a new book. I put other formulas in that book. All that we bought, we copied everything right then and there, complete copies of everything he had. I would not say how long it took, I made them all at one session. That book was pretty valuable then. I have not now got it. I have not seen the book in eight or ten years. I do not remember the last time I saw it. The second time I came back to Atlanta was about 1899. I met up with an old friend Mr. Brittian, and at that time I was experimenting a good deal with the drinks of this kind, and worked out a drink which was afterwards called Celery-Cola. I had been working on Celery-Cola four or five years prior to that. It had been on the market very little, I may have sold a little here and there. I had labels for it at first, it seems to me the first labels I had was just before the Atlanta Exposition. In 1900 was when I started bottling it. I started it out as a fountain drink, four or five years prior to that, in '94 or '95. I told Mr. Brittian I had a Celery-Cola. He liked the name

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and liked the drink and we made a deal based on Celery-Cola. If I testified in my direct examination that I was simply experimenting with it and Mr. Brittian, I told him about the adoption of the name of Celery-Cola in 1899 or 1900, I am mistaken, I may have stated that I commenced, but I do not know when I commenced but I remember just before the Cotton States Exposition. I stated this. "Yes, sir, I met an old friend of mine that lived in Birmingham, I told [1231] him what I was doing. I was undecided whether to stay in Atlanta or go somewhere else and he and I made a business arrangement whereby I was to move to Birmingham. That was in '99. I had been experimenting in other things, making other beverages, and I decided on Celery-Cola. I thought it might be a happy thought to make a celery beverage and call it Celery-Cola and I explained it to him and he said it would be a winner." That conversation I said I had with him and I said I had made and sold it prior to that time. I had sold it in Atlanta, the first I remember was just before the exposition in 1895. I had several customers that liked it, they liked the celery flavor. I had labels for it at that time. The syrup was in a bottle. I do not suppose I had sold more than a half gallon, just started and I labeled that bottle with a printed paper label. I cannot remember who I sold Celery-Cola prior to the Exposition in 1895, it was mostly small fountain. I did not sell that Celery-Cola long prior to the Exposition. If I swore in

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the Patent Office that I had made and sold Celery-Cola since 1893, it was a little clearer to my memory then than it is now, I made it way back there in '94 and '5 maybe '93. I was in Atlanta at the time. The name of our concern at the time I began making Celery-Cola was the Pemberton Medicine Company. The trademark has been used continuously in the business of said corporation and the business of its predecessors, J. C. Mayfield, since about 1893, just before the Exposition. I was not pushing Celery-Cola then very much, Koke was what we were pushing. I did not say anything about the Pemberton Medicine Company making Celery-Cola. I forgot it. They were not pushing the soda-fountain beverages Wine Coca, in 1893. The Pemberton Medicine Company always sold it in the Wine form. The soda-fountain syrup started with Mr. Ealey is my recollection. (Complainant's Exhibit #21.) This is Pemberton's original Wine of Coca, this must be the wine instead of the syrup back there, it must be that some of the soda-fountain people, I have a faint recollection of their selling wine as a drink. That is good for a glass of Wine of Cocoa. It was not so much a medicine as a tonic. It was not the original Wine Coca, that was a tonic and put up in quart bottles. It retailed at a dollar. I do not know how many glasses there were in a quart. I know I have just heard that they sold it. I do not know what they did. I [1232] think it was a full quart. The Pemberton Medicine Company was getting out the Wine Coca in wine form, I have no recol-

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lection of their having made any syrup over there. I do not remember the ticket. It seems to me like we got out tickets of Koke. I have none of those at that time, gotten out by the Pemberton Medicine Company. I sold this Koke to Mr. Tyner of the Tyner Drug Co., Atlanta, I think. Tyner was the man I met, and I sold him later on. I do remember selling him, he began right along there '97 or '98 or '99. I sold him the product in extract form, delivered mostly in gallon jugs, labeled Koke. Printed, block letters "K-o-k-e" and there I explained how to mix it with simple syrup. I cannot tell from whom I bought the labels, or who printed them, it was printed in Atlanta. It was a white label. I have a recollection of other customers but do not remember the names. There was an Italian, right close to my place of business that handled it right along. In Atlanta I cannot recall any more, but can remember some outside. I sold a man, commenced with him in 1888 with Koke. In Gainesville, Florida, old Judge Bell, he was postmaster there. I sold him for several years. I do not know just the last I sold the judge. I do not know why he quit. I think possibly his death stopped it. I also sold Mr. Groves of Ocala, the Mr. Groves that testified in Atlanta, and I had other customers and I tried to find them, some of whom I would have a recollection, and they would be dead. Whether Mr. Tyner is living I do not know, I do not think he is now. I sold Edmonson Bros., I do not recollect when they started, but they bought right up until 1901, two and three, the

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Mr. Edmonson that testified in Atlanta, was one of the brothers. Edmonson was a good customer. I was in Birmingham and Nashville along there and was also in St. Louis, first one place and another. I remember shipping some from Birmingham, that was Koke. It was not the syrup, it was the Koke extract. Now, along there Celery-Cola and Koke were interwoven, here and yonder and it is pretty hard to remember just who is who. I did sell a man in Atlanta, extract and I believe his was Celery-Cola, an old bottler there named Harris. I think his was altogether Celery-Cola, and I had men, but I do not remember of making but one or two trips myself [1233] over there to Florida, Gainesville and Ocala. I cannot recall right now, but we did have we were bottling goods in Birmingham and after I took hold there in 1903 and along there we had quite a lot of railroad contractors that we sold to and some local trade, bottled goods and we had—I am trying to think, it is pretty hard to get back there. I would love to think of them. I cannot recall it seems to me like I shipped to Sutton Bros., of Mobile from St. Louis. That must have been in 1901 or 2 or 3, maybe. That was Koke. And I sold a man, shipped him goods in St. Louis in 1900, it might have been the latter part of '99, it was either '99 or 1900. A fellow named Bob Baxter went to St. Louis to go into this line of business from Atlanta. I do not know what has become of Mr. Bob Baxter. He was formerly from Wilson, Missouri, he used to be a tobacco drummer. He knew of my Koke and Celery-Cola

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syrup and decided he would go back up into the neighborhood of his old home and go into business. That was Koke. At this particular time, this was in 1900—he did go back later and handled Celery-Cola. That is so far back it is largely a mail order business, we would send out and get a list of customers that is a list of dealers and I would mail them an ounce of my compound, with instructions to mix it with ten ounces of simple syrup. That made the goods ready for use. That usually brought an order, my terms were cash to the trade. Lots of people we shipped to that way. Some reordered, some may not. We did largely, quite a mail order business. That was in the extract. I did not go into the syrup business very much until 1909 or '10. Largely into the Koke syrup business, that was when I had trouble with Celery-Cola and got a black eye, with cocaine in it, the government found it and then I thought I would naturally have to overcome that and I pushed Koke. I would not say Koke had been our best seller up until then, we sold more Koke possibly from '88 to 1900, Celery-Cola for several years I believe was in the lead. Up to this suit and since then we have done more Koke business because we have pushed it. I decided to go to Birmingham when Mr. Brittian came along is about the best of my recollection that was around 1899. Mr. Brittian was my associate, [1234] I believe we styled it J. C. Mayfield Manufacturing Company. That is the first business in Birmingham, Alabama.

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If there was a license taken out in the name of the J. C. Mayfield Manufacturing Company, to do business, Mr. Brittian attended to that. I do not know that there was. We bottled along in the last of the year, maybe the first of 1900, but a little cheap Hutcheson stopper machine, besides bottles I did myself a little trade back in Atlanta that I took care of what time I was in Birmingham, and I had Mr. Brittian go around Birmingham with this bottling business. We did business in this bottling business under the name of J. C. Mayfield Manufacturing Company. I continued with that Hutcheson stopper probably a year, maybe not that long. Mr. Brittian bought the bottles, I do not remember who he bought them from. He was bottling Celery-Cola and not bottling Koke. I made Celery-Cola compound and extract. I made Celery-Cola syrup, nobody has ever made it outside of myself, the boys, and Van Dusen. Mr. Brittian or some of the hands made the simple syrup. I would not say that he did not bottle some other flavors. I do not believe he did bottle Koke. At that time I do not think anybody in the country was bottling Koke, or any other cola beverage. I think that was about the time I started. Mr. Brittian and myself continued in that bottling business under the name of J. C. Mayfield Manufacturing Company a very short time. Maybe less than a year. We started in '99, he may have made the change in 1900. I left that with him, because I was in Nashville and St. Louis. I left before Mr. Brittian ceased. While I was in St. Louis

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the Brittian-Mayfield Manufacturing Company continued bottling, but they had discontinued before I came back to Birmingham, using the Hutcheson stopper. They were not making extract in Birmingham. I stayed in Birmingham something less than a year at that time. I went to St. Louis and went into the extract business, that was really my own business. I had not been to St. Louis before. No one else was interested in that business at that time. This man Baxter—we did not perfect the deal. When I first went to St. Louis I made Koke and [1235] Celery-Cola, I did not bottle either one of these drinks there. Mr. Brittian was the first man to bottle Celery-Cola and no other man up to that time had bottled either Celery-Cola or Koke. That is my recollection. I do not recall the name I used in St. Louis. Possibly I used the J. C. Mayfield Manufacturing Company stationery, if I had any along. I just scratched Birmingham and put St. Louis. I had some of the stationery in Birmingham. Mr. Brittian had that printed. I do not remember what was on it. This agreement with Mr. Baxter was not perfected; he never went in with me. I did not employ anyone in St. Louis. I traded with Mr. Baxter and made some extract in his home. I had a few customers there that I supplied to them. It was summer and I was working it myself. I was not there very long, a few months. I went from St. Louis to Nashville. I went in business in Nashville, immediately after going from St. Louis. That too I

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think was the J. C. Mayfield Manufacturing Company. A short time after I was there as I stated in direct examination, I promoted an oil company. I do not remember whether I went into any other business besides the oil company. I was never with the Tennessee Carbonating and Supply Company. I do not think I was president of that concern. If I was I was a dummy I do not remember having any connection with it at all, but I may have. (A charter of incorporation, Complainant's Exhibit #22.) It seems to me I was one of the incorporators of that, but I do not remember having put any money into it. They bottled some of my specialties. I believe they bottled Celery-Cola; they did not bottle Koke. The first manufacturing I did in Nashville was at Diehl and Lord's bottling plant, they bottled the Celery-Cola. I made my extract there. I made Celery-Cola, Pepsi-Nola, Koke, and I believe I made Vigo, that was in the place of business of Diehl and Lord. J. C. Mayfield Manufacturing Company I believe that is the style I used there, I do not think that was incorporated. I must have had stationery there. I do not remember what was on the stationery. I was getting out Celery-Cola and Koke in extract form in that place. I would say that was along in 1900 or '01. I was at Diehl and Lord's place a few months. It seems to me I went from there over near the Tulane Hotel and rented a basement. They did [1236] not have much room there at Diehl and Lord's Place. I have forgotten the name

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of the street. I stayed there a short time but my office, all along then I had the oil companies going, I had an office in the Vanderbilt Building, and I was doing my manufacturing and attending to the shipping, that is expressing of my extracts over the country doing a mail order business, and it was most too far, I thought from my office and I moved it to the rear of the Vanderbilt Building and I left, that must have been along in 1902. In 1902 I went to the oil field to look after the putting down of the wells and pushing up the business there for a while. That was in Southern Kentucky. Wayne County was one, southern Kentucky adjoining the line of Tennessee. The headquarters were in Nashville. I made my headquarters where the wells were, for awhile. I was in and out of there for three or four months. My son took charge and I believe in fact I know that he moved out from the Vanderbilt Building over near the river to, I believe Market St. We were making extracts. We might have had a few syrup customers. My sons worked the City. They may have sold some syrup. I was in the oil field sometimes in St. Louis and sometimes in Birmingham. #23 seems to be a letter dictated by my son and signed by the J. C. Mayfield Manufacturing Company. I stayed around Nashville going in and out of Nashville to my oil wells up to about 1903. I do not believe I had anybody working for me in the extract business at Nashville, Tennessee, during that time. My son came and worked with me. While

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he had charge he had nobody working for him, that I know of. In 1903, I went back to Birmingham. This Brittian—J. C. Mayfield Manufacturing Company was on Morris Avenue and a little while on South 20th street—no, I would say he was on south 20th street—I was not there when Mr. Brittian had his plant; he sold it and the latter part of 1901 or '02, when I first went to Birmingham he was on Morris Avenue; I am not sure of the number. That was the J. C. Mayfield Manufacturing Company on Morris Avenue. I had my place in there, when I was there. I made it anywhere I happened to be. Sometimes I went back and made a *litt* and if I did not have time to go I would ship it. I do not remember that I had a bottler anywhere that bottled Koke. When I got back to [1237] Birmingham in 1903, Mr. Brittian had sold out in Birmingham and was in St. Louis. I do not know who worked for Mr. Brittian at the time he was bottling Celery-Cola in Birmingham. Mr. Brittian who was in Birmingham left there while I was in Nashville and went to St. Louis, that was in 1901 or '02. Mr. Brittian went into the Celery-Cola business in St. Louis. I believe he used the same name there as in Birmingham, J. C. Mayfield Manufacturing Company. He continued the business there, I would say fifteen months, along there, somewhere, a short time, that would take it up to about 1903 or '4. I could not tell you what he did after that. I don't believe I have seen Mr. Brittian since. I do not know any-

(Deposition of J. C. Mayfield, Sr.)

body that was employed by him at St. Louis, Missouri. I was not there but once or twice. I have not had any other connection with him in a business way. When I got back to Birmingham from Nashville in 1903, I think Mr. Brittian had sold out lock, stock and barrel to a man named Fox. Fox bottled Celery-Cola and my recollection is that he bottled some Koke. I believe he called it the Celery-Cola Bottling Company. I would not be right sure about that. I would not be right sure, but I rather think he bottled Celery-Cola, Koke, and Pepsi-Nola. I had a pepsi-nola drink. I do not recall seeing any labels of Koke around his place of business. I do not remember who was working in Fox's place when I got back there. I do not remember the name of a single person. I saw some Celery-Cola bottles. I think he was using a bottle with a crown on it. I could not say what that crown had on it. That was my first trip down there for quite a while. It was not a going concern when I was there. I could not say that I saw any crowns with Celery-Cola or Koke on them. I remember seeing labels on the window, Celery-Cola that is as far as I can remember. I don't remember seeing any Koke labels. This Fox Celery-Cola Bottling Company was located in Birmingham, near the postoffice somewhere, not very far from there. It was not the same place Mr. Brittian had, Brittian was on Morris Avenue. In referring to the Fox Celery-Cola Bottling Company I simply used Fox to distinguish it. One reason I went, Mr.

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Fox owed me quite a little money for extracts I shipped him. I stayed there thinking I would get something out of it. [1238] I do not think I got a penny. There was a mortgage on it, a loan and the bank had to close it all up there, that is the best of my recollection. It seems to me, to the best of my recollection a man named Ensley and Moody, I believe are the parties who bought it. Mr. Schuyler and I figured on going in and buying it but we did not have but a short time to adjust it. In St. Louis I contracted, I had a licensee there, they continued under the name of Celery-Cola Company.

Q. 814. In Nashville, who did you leave there?

A. My son was there.

Q. 815. And he was making what?

A. He was looking after the shipping business at Nashville.

Q. 816. He did not make up anything; you sent it from wherever you were?

A. Yes, he did some manufacturing.

Q. 817. Say why you went to Birmingham to see this condition in regard to the Fox Celery-Cola Bottling Company, your son, Mr. Steve Mayfield, remained at Nashville and did some manufacturing, manufactured these extracts, both Koke and Celery-Cola? A. Yes, sir. [1239]

The men that bought the Fox Bottling Company out were Ensley and Moody, I cannot give you their initials. I have not seen Ensley in eight or ten years. I have not seen Moody in four or five years.

United States
Circuit Court of Appeals ✓

For the Ninth Circuit.

Transcript of Record.

(IN SIX VOLUMES)

THE KOKE COMPANY OF AMERICA, THE SOUTHERN
KOKE COMPANY, LIMITED, THE KOKE COMPANY OF
TEXAS, THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,

Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,

Appellee.

VOLUME V.

(Pages 1661 to 2108, Inclusive.)

Upon Appeal from the United States District Court for the
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Filed

SEP 13 1917

F. D. Monckton,

Clerk.



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(Deposition of J. C. Mayfield, Sr.)

I do not know anybody that worked for Ensley and Moody. Right along there I had an interest with Schuyler and he went out of business, and I had more room than I needed, and they moved this plant when they bought it to the back end of my place of business. That was 15 South 20th St.; I could not say under what name they did business I do not remember now. They were bottling Celery-Cola and some of my other specialties, I do not remember whether they bottled Koke or not. I presume I furnished labels for Celery-Cola at that time. I did not furnish the crown, they would buy that from the manufacturer of crowns. They got them from the Crown Cork and Seal Company. I do not remember that I furnished them, I may have furnished labels at that time. I would not say where I got these labels from. We got them everywhere I happened to be; we had some printed all around, no particular place. The American Label Works of Nashville, Tennessee, printed a good per cent of our labels. I think that was in 1903. I think they printed Koke labels there. If we had any bottled I would not say. They did a little later on. About 1900 I was shipping Koke, and Koke crowns, advertising matter and labels to a Mr. McGraw at Gladsen, Alabama. As a rule I carried crowns, but not bottles. I had also some plain crowns. I do not know just when the Koke decorated crowns came out. I do not think we got the crowns; I think he got only the labels, if he got crowns they were plain; he did not get any with the word Koke on

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them. I sent him Koke labels. They might have been made at American Label Company or from most any place you find printing labels, cheaply. [1240] Those labels had Koke on them in block. I do not remember when I first took up the script. We did not pay much attention; we use the script to-day and the block to-day. I could not say for certain when I took up the script because my boys were on the road and lots of labels were printed and shipped to people I never did see. I do not think I made that first cut made up of Koke; I think the printer Boylin in Nashville had that done. I was a good customer and my boys were selling labels all over the country. He was on the road and represented the label house on commission basis, and sold to everybody all sorts of labels. The first label was block; I do not know whether it was a cut or set up; they were this block type of all sizes and it was not necessary to have a cut, the script came out after the block. I would not say when it was made (#6 & #7). I had lots and lots of cuts made for all different flavors and as a rule he would have them made and render me a bill for it, but when that was made I could not say (indicating #7). I could not say when I first commenced using the Koke in the form displayed on #7. I used the block letters in 1903 I think. My son was on the road jobbing; I cannot just recall but he sold, he may have had some of those labels and some others of the printer in Nashville. I cannot say about that. I know a very small per cent of the

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people whom he sold. He did not restrict them to any territory and they sold it everywhere. I do not remember as far back as 1901 on the script; I think we were using the block. I would not say for certain that is I individually remember the block but I do remember the script just when the printer made it out I do not know. I have seen that script prior to 1903. I do not know whether it was a label Mr. Boylin sent me but I took that drawing and I had this big cut made from that. I had that made in about 1909. I mean in that large shape in the script as shown in Exhibit #7. That is my positive recollection I may have seen it before. I have seen that script prior to 1903. I had heard that the Murfreesboro people had that Koke registered. I would not say Exhibit #7 was new and original with me and some of my associates. I think the American Label Works were the first people that sent me the first one, I saw it—they may have made it just for me; they may have made that cut for the Murfreesboro people, I do not know about that. I never saw the label of the Murfreesboro [1241] Bottling Works, until I went over there, that is the first time I had seen that label. I cannot describe it; I was not there but one day and did not pay enough attention to it to describe it, this describes it. I was not there after the label especially, I was after the trademark, they did not turn the label over to me. The label I have adopted down in New Orleans, my printer got up, the artist got it up. I only recognize the word Koke (indicating Exhibit #24)

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as it appears there, I do not remember anything about the label. I did not deliberately copy the label at New Orleans; I did not have that in view at all. I was having my own labels printed right then. I was using that label long before I heard of the Murfreesboro people having a trademark. I was using this script label before I heard of the Murfreesboro label. I remember further back than 1909. Some of my customers I am satisfied used it further back. Well, if my label man in Nashville printed a lot of labels and my son ordered them out to people they sold goods I am satisfied that is when it started so far as I am concerned; I was not on the road, I was not selling the goods. I do know that script was possibly used by us prior to the time I mentioned, and made this big label, but just when or where I could not say. We used the block type around 1903, and using it yet. Before I bought this bottling plant I had gone in with Mr. Schuyler. Mr. Schuyler was in the vinegar and cider business and I bought in with him. I exchanged some of my stock in the oil business for the purchase in to the Schuyler business. That was on 20th Street. After I bought in with Mr. Schuyler in the vinegar business I bought out Ensley and Moody. I do not think Schuyler was making anything else besides vinegar. I think I moved from Nashville there and from St. Louis there. Right along then was when Mr. Schuyler was falling down and I had to go down and take the whole thing. I took over the vinegar business and took over the bottling business and

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united them, under the name of J. C. Mayfield Manufacturing Company. We ran along while under that name on 20th Street. [1242]

Q. 919. I will get to that; the J. C. Mayfield Manufacturing Company was on 20th Street, this bottling—they were bottling what? A. They bottled everything I was then introducing, all my different flavors.

Q. 920. They bottled Koke? A. Koke, Celery-Cola, Vigo, Pepsi-Nola, and all the soda-water flavors, used the bottles those other people used. They were using a bottle that required a crown cork. We had a label on the Koke bottle, on this label [1243] was “drink Koke,” “drink delicious Koke,” or something like that, I do not remember the exact words. I do not remember whether it had the name of the concern or not, it was a very cheap label. That was around 1904, I think, a Nashville concern was making the labels. I used Koke in the block type. I had my sons there then, the two oldest, and I had some traveling men from time to time. I had one fellow named Benjamin, his line though was vinegar. My sons were on the road for themselves; they were the traveling men for the different flavors and the bottling business. I think I had stationery, I do not remember what was on that stationery. These draymen and syrup mixers are men that come and go; I do not remember who I employed there regularly; there was an old fellow named Smith that did the bottling, I do not know his initials. We called him Ira Smith, that was a

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nickname I believe. I believe he was in Birmingham the last I heard of him. I saw him when I was there a short time ago. I do not think he testified for me in this case. I saw him on the street in Birmingham just as I went up, just as we were leaving. I kept the books myself, we may have had a bookkeeper, I was there all the time looking after them. I believe I did have an old man named Garrett. I have not seen the old man in six or seven years. I do not know as he is living. We had a lot of negroes come in and go out; we had a young man named Montgomery, and we had another young man that helped us around there, I think his name was Levender Edwards. About 1904 the plain crowns came cheaper, and while I was labeling it was simply unnecessary to pay more for decorated crowns; it seems to me I used the plain crowns. I was buying the crowns from the Crown Cork and Seal Company; they were the only people who were manufacturing them. I cannot say whether I had Koke or Celery-Cola on the crown or not. We ran along there as the J. C. Mayfield Manufacturing Company at 20th Street, possibly twelve months, along there somewhere. Somewhere along in 1905 we changed the name. I could not say exactly, but about a year thereafter it was in 1905, maybe a little later, maybe 1906. That was the same bunch employed by the Celery Cola Company, we did not change then but the name of the business. I do not remember whether a colored man by the name of Brewer was employed by me or not. I do not

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[1244] remember any man by that name. I continued the same business, Koke and Celery-Cola, and used the labels Koke and Celery-Cola. As to our stationery I may have mentioned a few of our products. We tried to get up a nice letter-head; we left it as a rule to the artist to get up. Inasmuch as this name Celery-Cola I presume it mentioned that, it did not mention Koke, I would not say. The place of business first was on Morris Avenue. I remember this (indicating Exhibit #25) that was not the Celery Cola Company, a corporation at that time, we put it into a corporation later on. I believe it was an Alabama corporation. The Celery-Cola Company had the bottling right. This was my business and the other was the Birmingham Celery-Cola Bottling Company. I made the flavors, the Celery-Cola Company never did, they were licensees. I always got a profit on my goods. I continuously made up the flavors, at that time. I made the general line of flavors that they used there. I made my lemon and orange, and put up a general line of soft drinks aside from my specialties. I was making up all my flavors. Sometimes somebody may have run out and got a gallon of flavoring from somebody else.

Q. 994. You made Koke flavoring and Celery-Cola? A. Yes, sir.

Q. 995. And you are the only one that made that up to the Van Dusen time?

A. Well, my boys made it.

Q. 996. You mean Steve?

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A. Well, Steve did and some of the other boys.
[1245]

What I considered the keynote of the thing was flavor, and the boys always had a gallon or two of extract, and it was an easy matter to do the mixing of the other things. The Celery-Cola Company was simply a company that handled my products that I had made for them; they did in the bottling business. That bottling business was located on Morris Avenue, and handled my Koke and flavors too. The same bunch were employed, that is they were with me then, the boys were there. My youngest son comes in somewhere along there, and myself and the bottle washers, that is about all I remember was around the plant. In our advertising during that period we did not say everything, we just called it by its name. I remember the hanger we had. It was "Drink Delicious—" whatever the drink was—"Celery-Cola 5 cents at fountains, 5 cents in bottles, Drink Delicious Koke 5 cents," we would have it in different shapes of that form, soda-fountain hangers, hangers for grocery stores, something like 5 by 6 or 7, not too large [1246] to be in the way, but large enough to show up well, those we sent out promiscuously so as to be hung around the places of business and we had different lines of advertising, other things we would use. We had umbrellas. I am not right sure that we had the wagon umbrellas. We may have had. That might have been just as we changed the name to Celery-Cola, I was going to push that altogether

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and we might not have had anything but Celery-Cola. I know this we made up our minds to push Celery-Cola and let the others take care of what we had. From 1903 to '8 Celery-Cola was advertised and Koke also. We had those little hangers we shipped our soda-water largely in sugar barrels. We packed like we do here, but we put a great many more because we had small bottles and we always put in some of the hangers on top of the barrel. We had them in every shipment and sometimes if it was a bottler, we would send him advertisements of the kind he was using those who were bottling Koke got Koke, and only people who were handling Celery-Cola got Celery-Cola advertising, only we had not as much of it, as we have now, as big a variety, but we had quite a lot. Along there the hanger was about the only thing we had for Koke. I would have different hangers printed; one batch I would have printed in Nashville, we had some printed in Birmingham. Any printer could print them, they were glad to get the call. Before I went to Birmingham I had about the same class of hangers. We got them from anywhere we happened to be. In 1900 I might have carried some Koke hangers over there from Atlanta. I could not tell you about the advertising I had for Koke from the time I got up Koke; most of it was the labels and hangers, sent out to the people that bought the goods. I sent the labels and hangers to the people that bought the goods. I sent them to Tyner and Edmondson, and whoever I sold it too. The first ad-

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vertising for Koke we got out in the beginning in 1888. I remember carrying them to some places. I would not say when he printed them but the Nashville printer, Boylin, did most of my labels of that class of work. I bought from him away back yonder in 1900, about 1900 it seems to me when I first went thru Nashville he was there [1247] making them. In fact I reckon he does only make a specialty of labels but he is not doing so now because bottlers as a rule have discarded labels altogether and use only the decorated crowns. This advertising I brought in yesterday, I used that kind as I say for Celery-Cola because at that period I was using them for Celery-Cola I was pushing that. I would not say about Koke, all we used was a lot of signs and hangers. We used them around the grocery stores, fountains and distributed them around among the wagons. I did not mention when we commenced with our free tickets, that they were always good for a glass of Celery-Cola or Koke. I think I gave out free tickets before 1910 for Koke or Celery-Cola. I cannot tell you when we had those printed, they were a cheap ticket we introduced along—they were I think I had a ticket, to the best of my recollection, it was printed with Celery-Cola and the other side had Koke. That was at Birmingham. It seems to me it was around that 1903 period. I might have had some free tickets it seems to me that we had some in Atlanta, that was Koke on those in Atlanta. We decided to take Koke and we had some hangers made for soda-

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fountains, pretty nice hangers. Mr. Bloodworth got them in Atlanta, I do not know what establishment. They were about a two colored hanger, is my recollection. It seems to me that I had advertising like that placed in evidence yesterday and part of this morning in 1908 and '9 for Koke. I had calendars they have always been cheap, good class of advertising, and I had a lot of Koke calendars. I had some of them in Birmingham prior to 1908. It was during the period I had just commenced in 1903 when I went back there. Wherever I had a bottler like now, if I have a bottler for Koke I have calendars gotten up for him. If I had calendars as Mr. McGraw has testified, I evidently got calendars, I made it a rule to get calendars. I do not know who made those calendars that is too far back. I remember the class of advertising, but I did not charge by memory with it particularly. I had some calendars made in the last sixty or ninety days, I do not know who made those, I will have to sorty look that up, I bought them from a local dealer and his [1248] house shipped direct, I believe they came from Chicago and Buffalo, I do not know without looking at the invoices where the calendars were from. I got them up in 1913, 1912, and 1911. I could not tell where I did get them and how many I got out back in 1912 unless I went to the records. I will try to look into that and see. If I kept one piece of all my advertising for the last 26 years this room would not hold it; I did not buy it to keep. The advertising that made up this sev-

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enty-five to one hundred thousand dollars I got right along from '87 to the present time. I could not say what proportion of this seventy or one hundred thousand dollars of advertising I got out before 1912 or '13. From 1900 up to the time I organized the Koke Company of America I would say the greater per cent of it was Celery-Cola. From 1890 to 1900, the greater per cent of it was Koke; I could not say how much for each period. Labels are not advertising to the public, but all that costs money, anything that holds your name out to the public is advertising to popularize that product for you. I would not say the greater percentage of that has been since I organized the Koke Company of America. I call them licensees places that have started at Ft. Worth, Dallas and here, do their own advertising. I do not know how much they have done at these different places. I reckoned on that as some of it. How much these people have spent on it, I do not know, I have heard them say that they had spent thousands of dollars. We spent considerable, it would be guess-work. That particular line of samples may come in that recent date but we had some stuff prior to that. Knowing the Dallas office did their own advertising of course I do not know what they paid until I came here; I do not know where this office advertised or bought. I came here in 1913. In 1913 I do not know of anything outside of what I bought from a man named U. O. Postum. He is located some place in Illinois. I bought quite a lot of calendars, I think some fans

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and blotters. I could not say how much, a good deal then. I make it a rule to buy from every man that comes along. I give them all a little business if I am in the market. I bought from a local [1249] representative here, a Mr. Goldsmith, and another Mr. Juhl, and two or three others that I cannot recall. Of course most of the goods were shipped from other representatives, but I do not recall the names. I did not take up any receipts; my son looked after that. I think I have the receipt for the 1913 advertising since I was here. I will dig those up and make a point to see if I can find them. I have been all over the southern States. My boys and I would buy it and use it and have it printed at different places. We had quite a lot of printing done in Nashville by the American Label Works. While in Birmingham we had some banners. We gave one of the theaters there a little ad on its program. We had these outdoor signs. Maybe some are tin, that might not be destroyed. Those streamers that we had so much fun over in Birmingham were made right along there in 1903 or '4, I believe from a firm in Coshocton, Ohio, the Meek and Beach Company. The Koke Company at Shreveport was formed in 1910. We were in business prior to that, we were in business in 1910 and this corporation was worked up a little later. A fellow by the name of Whitmire and I started it off. He did the mixing and shipping. There were other parties interested but Whitmire was about the only party that put in any money. I sold to Mr. Whitmire and his

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associate from St. Louis. I never met his associate. They sold nothing but Koke. I was president of the Koke Company Limited of Shreveport. I started business in Shreveport right after Christmas, January or February, of 1910. Before we organized we called it the Koke Company. The corporation was organized later in the summer of 1910. I was president and principal stockholder. My business in fact. The organization was never completed, I had control of it completely. The corporation lasted about three or four months. Altogether we may have been in Shreveport a year. I could not give the month when the corporation was organized. W. L. Bidding lived in Sherman, Texas. He was a druggist. I do not know what his address was down there it is a small town. I do not know if they have any street numbers. It was on the east side of the square, the courthouse was in the square and the stores all around. [1250] I first met him when I first heard of his trouble, I went up there and met him on that trip. I went to buy him out. I could not say the date of that, the papers will show. He had the label registered quite a while, since '98, and the first I paid any attention was when he filed his papers in Washington for a trademark based on this registered label. I only saw the label that he turned over to me. He told me the product that label was put on was the Koke beverage the same as I made. He did not tell how it was made up, he said it was a soda-fountain beverage. I bought the trademark, that registered

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label, and whatever he had in the way of registered trade, he told me he would not manufacture any more from that day and he did give me an order for my goods, an order for Koke. I did not buy his drug-store. He said he made syrup and sold it as Koke. I did not buy any formula from him. I did not buy his drug-store, or lay great stress on how much he had done in business, but I bought it more to get it out of the way, it was a cloud on my title, and that was the most satisfactory way to get rid of it. I bought the trademark and registration, and the business, and I got the business whatever he had. He told me of customers that I was already selling Koke to. I did not take over any tangible property, nor any labels, he did not give me a formula. I had my own formula. I do not know anything about this chemical combination he had used the name Koke on. You know more about those interferences than I do, Mr. Bidding undertook to change his registered label to a registered trademark. And I had the Murfreesboro registration of record in my name and I received notice of Mr. Bidding's application, and that is where I got hold of it. I got this assignment from Bidding, rather than fight it out. My attorney said we could beat it out and thought it best not to buy it. I said I thought it was the cheapest, quickest and most satisfactory way. I found out about Bidding after I had bought the Murfreesboro registration and found that an interference was entered at the Patent Office between the Bidding registration and the

(Deposition of J. C. Mayfield, Sr.)

Murfreesboro registration. The assignment was filed and the trademark was issued to the Koke Company of America. I did not get any formula when I bought the Murfreesboro trademark. Mr. Bidding gave me his [1251] name and his business, he told me in fact that he had been making his own, I got that much if I did not get anything more. I got a customer and if there was any others he had been selling, he did not sell thereafter. Some I was already selling and others I sold later. I could not recall any of those customers. They live in Texas. He only mentioned a few, two or three around there. He said he had done considerable advertising, I don't know what kind. He did not turn over any advertising matter to me. I cannot give you the names of two or three customers he gave me. The trademark was the principal thing and to get his personal business, I wanted him for a customer, and the influence he might have. I would not say I was in Dallas, Texas, on May 6, 1913. I have been there whooping the business, but I would not say any particular date, I have been in Texas at various times. I did not make the statement on or about that time that there was no money in advertising as the Coca-Cola people advertised for me. Never in my life, nor did I state that I was entitled to this advertising, the Coca-Cola advertising, on account of the three-fourths interest in their formula. I have no recollection of having made any such statement to anybody at any time. I always felt and I do to-day that I have an interest

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in Coca-Cola and whatever they made up to the time I was barred by limitation I figured I was entitled to it. I stopped using this name Coca-Cola in the spring of '88, in April sometime. I have never used it since. Exhibit #26 is some of our advertising. Exhibit #27 is some of ours too; Exhibit #28 is some more; Exhibit #29 is also. Dr. Pemberton died about August 1888. I believe he is buried in Columbus, Georgia. I was living in Atlanta in 1895, 1896, 1897, and I was there part of 1899, the last part. I got there in the early summer, or latter part of the spring, of '99. I do not remember the Granite Hotel. Where the pencil factory is now that was a livery-stable. I did not stay in the stable. I do not think I was on Auburn Avenue in '98. I might have been thru Atlanta in 1900. I did not live in Atlanta in 1901. I expect I was in Nashville. I did not have a gentleman by the name of W. G Ferguson connected with me in the J. C. Mayfield Manufacturing Company. I knew a Ferguson connected with Diehl and Lord, as bookkeeper. He was not connected [1252] with me. H. L. Brittian was in St. Louis. He was not the general manager of the Mayfield Manufacturing Company in Nashville in 1902. We may have made application for a charter along there but Mr. Ferguson was never connected with the business. I was not in an iron manufacturer nor had anything to do with iron at that time. I might have been in Nashville in 1903, I was in Birmingham. We were located at 1503 North High St. We had our office

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in the Vanderbilt Building. 1503 N. High St., was a boarding-house, where I roomed and took my meals, I had no office there. Mr. J. H. Zarich was secretary and treasurer of the Mayfield Oil Co., and manager. And Charles Sikes, vice-president, that is my recollection. I may have gone to Nashville in 1904 once in a while I may have got business there. I have not had a place I could call home for a quarter century. I have lived in boarding-houses, hotels and restaurants, where I thought it best to push my Koke. Zarich was connected with the Mayfield Manufacturing Company. I do not remember his position I believe he was secretary. The organization at Little Rock was just in the family, it never amounted to anything, we did not push it. I do not believe there was ever any stock issued on that, we may have met and accepted the charter but never did business as a corporation. There is no Atlantic Koke Company. I made a contract with a man named McCoy of St. Louis. In that contract he had authority to go over some offices, whether he has ever been duly organized in any place or anything I do not know. Exhibit #30, that is the first time I ever saw that card. I never saw one like it. The Central Koke Company is not a corporation, it is doing business. I may have given McCoy one of these Pemberton certificates, but as to the complete history of Koke, I never have.

. . .

(Exhibit #31.) I will say in the beginning I never authorized this.

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Mr. LITTLETON.—You ought to ask me about that; I can tell you about it.

Mr. HIRSCH.—Do you know about it.

Mr. LITTLETON.—Yes, I did not know it until after it was done. I have scanned over this, this is the first time I ever saw that, that is not true. I heard of a man named Holland mentioned here but I never heard of a man named Venable, Lowndes or anybody ever having any interest or being connected in any way with Dr. Pemberton. Some things here about Mayfield being president of the [1253] Koke Company, that is true. It says Dr. Pemberton without the knowledge of his partners transferred to Walker, Candler & Co., of Atlanta—I never knew anything about that, nor did I impart this information to Mr. McCoy, he got a hold of some one's literature. I certainly didn't have anything like that. Exhibit #32 seems to be an exact copy of the one we put in. We applied for this but I have no recollection of ever having organized that. I cannot say I was in business in Richmond, Virginia, and I can say no individually, I was not there, my sons were there, and it was a family affair. Exhibit #33, I never saw. It was something my boys got up out there, they were there part of two years, I have never been to Richmond.

Q. 129. I want to ask you if your first wife became Mrs. Diva Brown afterwards? A. Yes, sir.

Q. 1299. And Mrs. Diva Brown was around the plant in Atlanta, Georgia, she was Mrs. Mayfield at that time, and was around the plant in Atlanta,

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Georgia, was she not, when you first started to manufacture?

A. No, sir; she was not there in 1888.

Q. 1300. When did she start coming around the plant as I understand?

A. Well, she started when I went back there in 1903.

Q. 1301. 1903? A. I mean 1893. [1254]

Q. 1302. Well, did you go away from Atlanta before 1893?

A. I sent my wife away from there, and children, back to Roanoke, Alabama. My family were only there for a little while, the children in school. It was a cheaper place to live and after she got well they came back.

Q. 1303. In 1893?

A. She was not around the place, nobody ever seen her around there during the first business there, 1888 or 1889.

Q. 1304. Did she help manufacture around the plant at all?

A. She may have helped a little around with my son and Mr. Bloodworth, when we went back there I think she did, in '93 up to '94 or '5, along there.

Q. 1305. Was she familiar with this formula that you got from Doctor Pemberton?

A. Well, I could not answer that, she had opportunities helping around there to get familiar with it, and what a wife would have with a husband's business.

The formula for Coca-Cola was not disclosed by

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Dr. Pemberton to Mr. Murphy and Mr. Bloodworth, that I ever heard of. Q. I will ask you if you have ever seen or heard of—first if you have ever seen; Second if you have ever heard of; and third is the following true:—"In 1888 O. A. Murphy of Barnesville, Georgia, and J. C. Mayfield of Alabama and myself, bought Dr. Pemberton's formula including Coca-Cola. Mrs. D. Brown was then the wife of J. C. Mayfield. She was not known to us as a member of the Pemberton Medicine Company, but she spent considerable time in our laboratory and took a great deal of interest in our business. A few months after our purchase Dr. Pemberton stated that he had neglected to state to us at that time that he had sold the Coca-Cola formula [1255] to his son Charles Pemberton and Mr. Walker, and should not have been included in the sale. Dr. Pemberton's deed to his son and Walker was dated a few days before the one to us was. We used the same formula and called the goods Yum Yum, but failed to successfully introduce it. Signed: E. H. Bloodworth." Georgia, Fulton County, personally came before me E. H. Bloodworth, who says on oath that the above is true to the best of his knowledge and belief. Signed this 18th day of July, 1905, J. C. Bloodworth, N. P. and ex-officio J. P. 10626 G. M. District Fulton County, Georgia."

Mr. LITTLETON.—Just a minute; I want to enter an objection to all testimony that Mr. Hirsch is now reading into the record, asking if something occurred and then going on to describe the affidavit.

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We object to the affidavit as immaterial and incompetent.

Objection overruled and appeal prayed and granted.

I have seen the whole thing. It is not true. This is true that A. O. Murphy of Barnsville and J. C. Mayfield of Alabama were connected, but my wife had no connection whatever. Now, as to anything about his having said he deeded it to Walker and his son, that is not true. He stated to us, Bloodworth, Murphy and myself, who were the only partners, that he would have to give in to his son, but as to having previously done so, he had not, in fact, mentioned it. It is true that he died thereafter. It is not true that we shipped our goods as Yum Yum. We discussed it. And we did adopt the name of Koke. I have no recollection of having an ounce going out under a label of Yum Yum, there may have been a little but only a week or so while we were discussing it, that was not long. We may have sent out some along with Koke to see which went the best. I did not like the name because it sounded like a Chinese drink. Yum Yum was similar to Coca-Cola, Dr. Pemberton in discussing, said it was a Chinese drink but I did not like it for that reason. After Mrs. Diva Brown left me I have heard she went around the country claiming to have the original Coca-Cola formula and selling it. I do not know of but one instance where I have heard that she sold the formula, and she did, in 1905, try to get up some evidence whereby she could do something like that. She

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[1256] was making her own living and that was the way she had of doing it. I have heard of the suit against Mr. Keller but she did not discuss it with me. I did not give an affidavit or any testimony in that case at all. We got along; she was perfectly free to visit the children when she got ready and they could see and correspond with her. I raised the children and if she wanted to visit them I had no objections. I do not know whether or not she claimed to have sold the original people the original formula for Coca-Cola. That one is all I know of for sure, I do not try to dig into her private affairs. I have heard of Afri-Cola, I don't know whether or not that drink is made according to our formula.

Q. 1328. Do you know of a Mr. Rice of Memphis, Tennessee? A. I have heard of him.

Q. 1329. Do you know him? A. Yes, sir.

Q. 1330. Did he work for you?

A. Yes, for a while.

Q. 1331. Was not there some claim that he took your formula away with him? A. Yes, sir.

Q. 1332. Was he prosecuted for that?

Q. Yes, sir.

Q. 1333. He started that with your formula?

A. I do not know.

Q. 1334. But he was prosecuted?

A. I do not know, only about the case.

Q. 1335. You were not there at the hearing?

A. No, sir.

Q. 1336. In what capacity was he working for you? A. Bookkeeper.

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Q. 1337. Where?

A. When I had the plant on Morris Avenue.
[1257]

That was the Celery Cola Company. I do not know whether Afri-Cola is still on the market or not. I do not remember Mr. Rice's initials. In Birmingham we sold, there was what you might call a prohibition territory, drink called hop ale. We sold considerable of that around over the country. Some people said it was not necessary to have a revenue license, but they did not cost much, so I took out a revenue license. I sold the phosphates and sodas that are common with the soda-waters and other syrups, my Koke, Celery Cola, and extracts, and bottled these goods, and Cider. I believe that was the line I had. Sherbets come under the head of phosphates. Sherbets were a little alcoholic to preserve them; you cannot make a flavoring of any kind without using alcohol. It was put in there largely for flavoring. We had to use it first in putting the essential oils. You have fluid extracts and patent medicines. And soda-water, there is not enough alcohol in soda-waters to keep them. The sweet or sugar preserves the syrup, and being water-tight in soda-water bottles that keeps them from fermenting. Lemon and orange flavors are made with alcohol. Mr. Gregory's initials were J. H. I bought an interest in the Gregory [1258] Vinegar Company in Birmingham; it belonged to Schuyler, whatever name it was running under it was Schuyler's business. My son was operating the J. C. Mayfield Manufacturing Company. I did not sell

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any of my interest in Mr. Schuyler's; I bought an interest; he sold his interest in the vinegar company. I sold some of my stock in the oil business. My son kept the books for the J. C. Mayfield Manufacturing Company at Nashville. I expect he had a stenographer. I cannot give you her name or his name; I cannot give you the name of any employee at that time of the J. C. Mayfield Manufacturing Company. He had a negro man there helping do the heavy work; I have forgotten the name, his first name was George. When I would go back and have charge of the office my son would travel; I did not stay in the oil field all the time.

Q. 1371. You state positively that during the time you were in Nashville the J. C. Mayfield Manufacturing Company manufactured Koke?

A. Yes, they manufactured Koke. [1259] I could not say for sure who bottled it at that time. I know old man McGraw was bottling there, but I have been unable to locate others; I know we have had others. Just now that is all I can remember. I shipped from Nashville to McGraw at Gadsen on the L. & N. and N. C. & St. L., about 1902 or '3. Out of Birmingham the railroad leading out of there North would be the Southern, I guess, or would you call it the N. C. or maybe the L. & N., I do not know just which it would go over. I was manufacturing vinegar in Birmingham, and also manufactured Koke, both syrup and extract. Exhibit #159, the October, 1914, number of the Southern Carbonator and Bottler, is a page ad the word K-o-k-e in script, and

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underneath it, Reg. U. S. Pat. Off., Dec. 27, 1898, No. 6752” That refers to one of my registrations in the office that I bought. I could not say which one the paper would show that we have here in evidence. The next is August 21, 1906, #55,878; I make the same answer to that as I did to the other, and the next is January 13, 1914, #94,869, that refers to the last one mentioned; if that is the last one, that must be the Bidding assignment that went through. Reg. U. S. Pat. Off. June 1, 1907, No. 63,033, refers to the original issue by the department. This advertising in the papers that have been introduced goes largely to the bottlers. These are trade papers. “You can [1260] secure a continuous agency for Koke or Dope, without it costing you one cent.” I mean by that I do not charge them for territory. “How can you supply your trade with Koke or Dope unless you buy it from us or our agents?” I mean that nobody, as I understand it, has the legal right to supply them with those beverages except myself. “We have the sole right to sell Koke or Dope and are protected in the use of these names by United States trademark registrations as shown above”; that is the proposition I make in this case, the name Koke or Dope or either or both, refer to, designate and distinguish our product exclusively. “Why buy imitations, when you can get the genuine Koke or Dope from us?” I have heard that bottlers would buy other cola beverages and sell it on calls for my goods. I regard it an infringement of my right under these registrations for a bottler or dealer to sell Coca-Cola in re-

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sponse to requests for Koke or Dope. "Keep your conscience clear, be at peace with the Lord, bottle Koke or Dope and you will enjoy health, happiness and prosperity, owing to the wonderful increase in your business." I mean just what it says, that is sell your customers the legalized drink, and Koke and Dope was the legalized drink. Koke and Dope is the same drink and produced by the Koke Company of America, and sold by its subsidiaries. "Be at peace with the Lord," is a phrase I put in there; a fellow that obeys the laws of his country, as well as this law there is no reason why he should not be at peace; the Government makes the laws, gives us registrations and trade names, and if you sell what the Government legalized there is no reason why you should not be at peace. No one can interfere with them, if they live up to the laws, and the Government has given registration on the trademarks Koke and Dope which I now own and which a man sell Koke and Dope in response to request for our product without interference to his trade. I claim I have got the best drink on the market. [1261] And a man can do more business selling Koke and Dope than he can any other cola beverage, that is the prosperity end of it, and the further fact that it does not cost him quite as much as other cola beverages, and it is of uniform strength and the best I can make, and a man can do more business selling Koke and Dope than any other cola beverage on the market. I have heard of others that cost a little more. Coca-Cola costs more to the trade than Koke or Dope. The retail price in each

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instance is the same. The dealer will make more by the increase in business; it is a business proposition.

[1262] I do not know of any other cola beverage that is sold to trade higher than Coca-Cola, or as much as Coca-Cola. That the dealer violates the law when he sells in response to requests for Koke or Dope, anything but the product of the Koke Company of America, I do not know as that is one of my arguments that I instruct our salesmen to make to the dealer in inducing them to buy our product. I tell our salesmen to sell our goods on their merits. The argument that I have made public in this advertisement is one inducement that is offered to the trade to buy our product; that is a business proposition. I do not know whether my traveling men used that direct language advertised in the trade papers. I got up those cards that our traveling men present to the trade. I do not think I made that same argument as on the card, that is the language (Complainant's Exhibit #9), reading: "Our customers will please notify us or the Industrial Surety Company of New York of any infringement on our trademark Koke or Dope, or of anyone substituting any other beverage for calls for Koke or Dope. This is a violation of the Federal Laws, and we will prosecute any person who will infringe on our rights to the full extent of the law." I got that card up. It is a fair inference or more than a fair inference from that language that I consider anyone substituting who sells in response to requests for Koke or Dope anything but the product of the Koke Company of

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America. By substituting I mean to sell a man one beverage when he has called for another. If he has a call for Coca-Cola and served Koke or Dope or *vice versa*, that is a substitution. I think that is unlawful and unfair. The Industrial Surety Company of New York is a company that looks after people who infringe on your trademark rights. I do not remember their address; I could not say what is the president's name or the name of any person connected with it. I did have a contract with this company; it has run out, maybe it has not expired. I do not know about them; I presume there is a lawyer connected with them. I do not know whether I have got their contract, but I can find their address on the correspondence. I will do that and let you have it. I have not brought any suits for the Koke Company of America for substitution, or any of any kind. I contend that I have the best cola drink on the market. [1263] My salesmen know it is better than Coca-Cola. In barrel lots we get a dollar a gallon, in smaller containers we get more: My opinion as an expert I think the terms Koke and Dope as used by the general public mean my product Koke. There may be cases where Dope may mean some one else's product; I would not say about that; there is no reason why it should mean any other than the goods manufactured by the Birmingham people. I do not agree with the witnesses who have testified that in this case Koke means any kind of Cola beverage. I do not go around soda-fountains much. I know what Koke means for the same reason that you know what

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Coca-Cola means. It has been on the market 26 years, advertised ever since the day we commenced, Koke went out at practically the same time Coca-Cola went out to the public; the traveling men out of Atlanta knew of Koke in 1888, and very little of Coca-Cola prior to that time, and they are great advertisers, and I figure that the traveling public has helped us as largely in popularizing Koke, as well as Coca-Cola. I have heard the expression Koke used at soda-fountains in Atlanta, and drank it myself. The people I sold it to, one is Tyner and a good many around there. Koke was like Coca-Cola; it did not have very many customers in 1888. I have not been over North or South Carolina; my boys have traveled over there, but I have reason to believe Koke means Koke there. Koke is used at the soda-fountains in Alabama, Georgia and the Carolinas. I presume this term Koke is used most in the States where I have pushed it most, Mississippi, Florida, Texas, Louisiana, Oklahoma, Arkansas and some in Missouri, are the States where it has been pushed most; the term Dope is used most in Birmingham, I presume. That territory has spread out some in Georgia. I do not know about North Carolina. I would not say to a greater part of Tennessee, than Koke. We received most of our orders for Koke from the States I have just mentioned, and most of the Dope orders from the Birmingham territory, Alabama and adjoining States. There may be an instance once in a while when a fellow means the other fellow's product. I

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would not say. I think Koke means my goods, maybe somebody else's, I can't read the other fellow's mind. I presume the word Dope is applied to Coca-Cola often; I presume it is applied to my Celery Cola and Koke even. I suppose Koke is applied to Coca-Cola; I would not say for sure. I have [1264] got Koke and Dope pretty extensively advertised in the States mentioned, I figure, in soda-fountains and bottlers and grocery stores. Some in North Carolina, I advertise Koke and Dope, advertisements such as I mentioned yesterday go to those places. I think that the name Koke as used around soda-fountains originated from my advertising; I think those hangers originated that. Exhibit #71 has not got the manufacturer's name on it; this was a 1914 calendar; must have been gotten out in 1913. I could not say how many of those I ordered; I mean this particular pattern. I presume I would have from one to three hundred for a bottler; this has a bottlers name on it; this same pattern might have gone to other bottlers. I have two or three Bloodwines bottling Koke. We have a Bloodwine Bottling Company at Tampa, Florida; they bottle Koke. Exhibit #73 was gotten out on the local market here, for New Orleans. Mr. Scott got a lot of these out before his death. I was not here. He got out a good many of them. Exhibit #74, I believe, I got this from a man in Illinois that I spoke about, Goust. We got a great many; I could not say how many. This was one of many patterns that we got, if I only got this pattern for one bottler he gave me from one to three

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hundred, but if I got it for another bottler I got more. He had some with our advertisement, and some with no bottler's name on them that I gave to the other trade. #75 I will make you the same answer. I would not say the same people got that out, but I believe that is the firm from whom I bought. The amount spent in advertising Koke in 1914, I can only answer for this business. This class of advertising, including tickets, I would say this office outside of—I mean including that class of advertising around three thousand dollars, that in tickets runs pretty high, I would say four or five hundred dollars, I include the cost of redemption. During 1914 the Dallas office advertised to the consuming public, the Chattanooga got out considerable advertising. I do not think the Central Koke did as much as we did. These leather aprons with Koke and Dope on them were gotten out last year. I do not know what time; I think maybe in the spring. I never had any aprons of the kind before. The last aprons I had I think were cloth. [1265] I remember having a brown apron prior to this, and it seems to me we bought it of those people in Coshocton. These brown aprons I had just before I left Birmingham is another class of advertising I had forgotten. I had Koke on those that was about 1906 or '7. The name of that concern, it seems to me, was Meek & Beach Company; there were two or three other advertising concerns I bought from, but that is the only one I recall just now. That apron that I had in 1907 had about what they have here, I presume. It did not have Dope,

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because I did not own Dope, but Koke. It did not have the name of the manufacturing concern at all, this number 124, I got out after buying the Dope trademark. I could not say when I did have that particular card printed; it is not a new card; we have had it quite a while; that card has been printed away back yonder. To the best of my recollection the De Luxe Press printed it, here in the city. The De Luxe Press printed that just after I bought out Houppert & Worcester, after I got the papers and everything. I purchased this advertising that I exhibited here on yesterday from the N. O. Cholston of Illinois, I believe that is the initials, Mr. Goldsmith, A. Goldsmith, I believe, I bought from him, and he had his folks ship some, and also Mr. Juhls, and he had his folks ship it. I also bought some from another local agent here. I am trying to think of them; one of them represented Walsted; in fact I tried to buy some from every man that came along. He might not have been representing this particular house I bought from and there is another house I bought from, I do not recall it. I cannot remember anyone else. Our advertising in 1913 did not amount to so much, I do not suppose, as in 1914. I do not know their books are not here; it may have been more, I could not say. I was in Jersey City such a short time; the name was either J. C. Mayfield Manufacturing Company or Pemberton Medicine Company. I did not do much while I was there; I was only there three or two months. After I left Birmingham I went from there back to Texas. I was in sorter bad

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health in Dallas, and I did not do much there for quite a while. I stayed there, but, of course, I was back in Birmingham two or three times. My sons were carrying on the business at that time, one was in Houston [1266] and one was at Birmingham. I myself was not active, right along then, I was resting up. I remember now making one or two trips to Houston, in connection with our business; my son was down there, and he *had* up quite a good big trade in his office and I went there and stayed there a good while, was working with my son, there was a fellow named Whitmire, the same Whitmire that was mentioned at Shreveport. A little later my third son Carl went down there, too, and stayed quite a while. I left that part of it, my books, accounts, and a mail order business that would come in, to my oldest son, who stayed there, and I gave the bottling business to my son in law, the Birmingham Celery Cola Bottling Works. They bottled Celery Cola; they did not bottle Koke. We thought that we would get along better to bottle Koke and have two bottlers in the same town. I did not get that there. My business went on still, manufacturing and extract business. Steve Mayfield who was in charge manufactured the syrups. Steve was handling that end of it looking after what mail orders would come in and for three or four years, we had several thousand dollars on our books. He was in that business up until around 1911, he went out of that business about the time and is now in his present business. My other sons were manufacturing down in Houston. We had a Celery

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Cola business in Dallas at that time, and had a Koke business in Houston. We had some bottler down there, I do not just remember where he was located, but he had his business at some bottling works. That bottler bottled our goods, he bottled Koke. That was J. W. Mayfield. I am a little ahead of my son going to Houston. He went to Denver and came from Denver; I think it was in 1910, he came back from Denver. The Houston office was opened prior to his coming. J. W. was in charge out there. J. W. stayed there and came here from Houston, I believe. I was in and out of Dallas, it must have been 1808, '9 or '10; 1910 I was in the Koke business, in Dallas, Ft. Worth, and Shreveport. The Celery Cola business was in Dallas up to 1910. The Koke business was not started in Dallas in 1910. We did a little manufacturing there for a short time, two or three weeks, but I did not want to get the mail, whereas there would be any confusion [1267] and I went to Ft. Worth and opened an office there. I do not really believe there was a name of the concern in Houston. My son was making that headquarters; he may have had some stationery, I do not remember about that. He sold and delivered, the stuff was being shipped from St. Louis. Mr. Van Dusen had taken charge of it; that was being shipped from St. Louis to Dallas and Houston. In 1910 I was over in Ft. Worth and I had this man Whitmire out at Shreveport. There was no one at Dallas when I left there. The old Celery Cola Company were winding up their business; I supplied Dallas from Ft. Worth in 1910 and '11.

(Deposition of J. C. Mayfield, Sr.)

The Dallas concern was known as the Celery Cola Company. At Houston my son was selling, they had some advertising for the fountains and bottlers and sowing seed; I let the boys go ahead and create a demand, build up a trade and then try to organize a company. I do not remember the name of the bottler at Houston that was bottling Koke; I was not there very long, maybe a day or two at a time. I was in and out of these Texas towns. I think my son went there in 1904 or '5 and first opened up in a small way. He opened the Celery Cola company up in Dallas, that was J. W., and later on he lost his health and he threw up the business. Steve was not there. I do not know just when I would go to see the boys, and see how they were getting along. Besides myself and the boys and Mr. Whitmire there was a fellow named George R. Clarke, and a man named J. I. Daley; I think Mr. Clarke is living now in Ft. Worth. I would not say what business they are connected with now. Daly manufactured for me here, manufactured for us all around. It is my intention and his, too, to do some manufacturing out there in that line, this is one reason he is sorter waiting on that. I was over at Shreveport two or three times, in 1910 and '11. In 1911 I contracted to George R. Clarke all of the State of Texas. And the established trade that they had in Houston I thought I had that territory so it would be taken care of and I went to Little Rock; I arrived at Little Rock about the summer of 1911. In Little Rock I rented me a place and ordered me some Koke extract from St. Louis, and

(Deposition of J. C. Mayfield, Sr.)

had my youngest son come there and go on the road to get business [1268] and sell Koke. I stayed in Little Rock only a few months; there is a fellow by the name of Parvin up there on the road you go to St. Louis; I cannot recall the name that I sold goods to. At Little Rock, J. I. Daly helped me mix, and, as I say Mr. Parvin took hold shortly afterwards there. That was the latter part of 1911 and I went back to Ft. Worth. Mr. Clarke had a deal pending with the Dallas people. McCarty Moore, they wanted me to close up, so as to close up and get things fixed satisfactorily and I stayed there then until sometime in the next year 1912. Then I went back to Little Rock, I stayed in Little Rock then for four or five or six months. I manufactured Koke back there, nothing but Koke. Koke was the only product I made in Little Rock. That was the latter part of 1912 they called me to Dallas; they had a deal pending with the New Orleans people, and they called me over there. I went over there and stayed about a week, and we agreed on everything; Mr. Moore then came to New Orleans and I went back to Little Rock. I stayed at Little Rock until some time in 1912. I was not manufacturing the flavor Koke at that time. I had contracted the State along about then, to the Dallas Company. The Dallas office took charge, and I turned over everything. My wife was in bad health and in the sanitarium to be treated and I had to stay there. Later on in the summer of 1912, after my wife came out of the sanitarium, I went back to Dallas and stayed there a little while and then we

(Deposition of J. C. Mayfield, Sr.)

went on to Mineral Wells, in Texas. I was not manufacturing then at all; Van Dusen was doing the manufacturing. Van Dusen manufactures a great many different things; he runs a pharmaceutical laboratory; he makes the extract. I had been using prior to my contract with him, fluid extract of coca leaves. He started after the pure food law went into effect. I was there in an endeavor to make my goods comply with the law, and stayed there quite a while, until we got it down like we have it now. Then he commenced making the extract Koke; he also made the Celery Cola. I might add there, that I made some myself in the meantime, but he has made the bulk of it. I will say this, however, for me he may have made these goods in syrup form, for my boys have been in and out of there, that is, making it for them, which is practically for me. [1269]

Redirect Examination.

Mr. Van Dusen makes Koke extract for the Koke Company of America, at a fixed price, based on caffeine. If caffeine goes up or down it fluctuates the price a little bit, he buys all the materials that enter into the compound, that is by my instructions. He makes it by the original Coca-Cola formula as I stated to-day with the changes I made, and the changes were those I have already explained. There is a verbal or there was a contract at the beginning but that has expired long ago and he has continued right along, there was provided in the contract with reference to Mr. Van Dusen making Koke for anybody else but the Koke Company of America. No

(Deposition of J. C. Mayfield, Sr.)

he has not made it for anybody but for us, but for me. He made it for me before he made it for the Koke Company of America.

Deposition of L. E. Whitmire, for Defendants.

L. E. WHITMIRE, a witness produced on behalf of defendants.

Direct Examination.

I am twenty-five years of age; my people live in Little Rock, Arkansas. I am now engaged in the soda-fountain business. I was connected with the Koke Company of Shreveport, Louisiana. That was the first of 1910. When I first became connected with them, I was shipping clerk, and handled the City trade. They had bottlers at Shreveport at that time. They labeled the bottles, the Koke they put out at that time. Defendants' Exhibit #121, that is the label we used in Shreveport. Defendants' Exhibit #121, that is the label we used in Shreveport. Defendants' Exhibit #164, this is a ticket that we used at our fountain to give our customers to use, at their fountains, a redeemable ticket, advertising our Koke Drink. I was in Shreveport possibly about three or four months, after that I went to Winfield, Louisiana. After I left Shreveport I was handling an agency for Koke. I went on the road with Mr. R. L. Flether and I sold the parties at Winfield, and I then went on the road for Mr. Winfield after I contracted with him, sold him the Koke business for Louisiana. He was a bottler. In selling Koke I traveled Louisiana, jumped into a

(Deposition of L. E. Whitmire.)

portion of Arkansas and Texas and also later I went into Old Mexico. In Mexico I went from Juarez to the city of Chihuahua. I sold Koke in Mexico. I only sold two, a Mr. Sutor, an American and the other was a Mexican I cannot remember the name. It might have been [1270] General Villa, but I doubt it. I stayed there, I handled the fountain in Mexico for about eleven months, in the City of Chihuahua and also I handled Koke on the side. I went to El Paso. I had a little office there of my own and I sold Koke there for quite a while, about a month I believe, it was something like that, about a month and a half. I made my headquarters El Paso. I was working the city only. I worked as soda dispenser at Richmond, Texas, and Sugarland, Texas. At Richmond, Texas, I worked for Mr. H. N. Dorris. When I went there they were selling Koke and I believe a drink called One-Better, of Houston—and Coca-Cola, Koke, and One-Better. I dispensed Koke and Coca-Cola. That was in 1912. I was in the Koke business from the first of 1910 to about the first of 1912, about two years. These other places I went to, these soda-fountains where I worked, I dispensed these complimentary tickets. I distributed some of those tickets in both Richmond and Sugarland. I put up advertisements at the soda-fountains. I had streamers, that is cardboards put up on the mirror and over my cash register.

Cross-examination.

These labels (Exhibit #181) was in Shreveport, Louisiana, I forget just exactly who made them, I

(Deposition of L. E. Whitmire.)

believe the Castle Printing Company. They printed them, I do not know who made the cut. I could not say whether they were made in Shreveport or not. I do not know where the cuts came from. I did not have anything to do with the printing of the labels. Mr. Mayfield did that. The drink One-Better is a drink a party was making in Houston, a cola drink. My position with this Koke Company at Shreveport was shipping clerk, handled the city trade, that is around town, the city, Mr. Mayfield was the head of the office, he was the owner of the Koke Company. He got our compounds from St. Louis, from Mr. Van Dusen. I am now in the soda-fountain business. Up to the first of this year I was in the fountain business at Sugarland, Texas, the Imperial Mercantile Company, at Sugarland, Texas, behind the fountain as dispenser. They were handling Koke there when I left there. At the present time I am with nobody, I have not worked since the first of the year. This place I worked was the Imperial Mercantile Company at Sugarland, Texas. [1271] And they handled both Koke and Coca-Cola. I worked there from August 1, 1912, until the first of 1915.

Deposition of T. D. Culbreath, for Defendants.

T. D. CULBREATH, a witness produced on behalf of the defendants.

Direct Examination.

I am forty-three years of age. I live at 3817 Bowser Street, Dallas, Texas. I am in the wholesale drug business. The name of the firm is The

(Deposition of T. D. Culbreath.)

Texas Drug Company. I have been connected with that company for four years. We job Coca-Cola and some Koke. I think we handled the Koke in 1912 or '13. I do not know the style of the firm who made the Koke, the Koke Company of Texas, a Mr. Boyd represented them. We were handling Coca-Cola also at the same time. Our sales of Coca-Cola amounted to between forty and sixty thousand dollars per year at that time. And about ten or twelve barrels of Koke. After we began to handle Koke the Coca-Cola Company shut us off from selling Coca-Cola. I talked with Mr. Candler of the Coca-Cola Company, Mr. Candler sitting here, Mr. Dan Candler, he did not say very much of anything about us handling Koke. He cut us off and I asked him what he wanted to cut us off for and he said because we were rebating, in other words, we were cutting the price on it and all the conversation I had with Mr. Candler about Coca-Cola as I remember now was that he said also, Mr. Culbreath you are not treating me exactly right, you also handle Koke. He said, your man Scott has sold some, is working in East Texas. He said he had a brother-in-law that works for the Koke Company and it is natural for him to promote his interests. Well, I took that up with Mr. Scott and I looked up our record and I found out that Mr. Candler was mistaken, all the business that Mr. Scott had taken was some that the Koke Company of Texas had given him, only two barrels and they came out of his territory. I think this is about the extent of the conversation Mr. Candler

(Deposition of T. D. Culbreath.)

and I had. We may have had more but I do not remember it. The Texas Drug Company were rebating when I went there, with them, I went with them in 1911. I do not know how long they had been rebating before that, for years I reckon. Our traveling men said other jobbers were rebating their customers on Coca-Cola sales and we met competition and rebated. We did that because others were rebated [1272] too. After the sales of Coca-Cola to us by the Coca-Cola Company were cut off, we quit handling Koke too. After we quit handling Koke we began handling Coca-Cola again. Mr. Candler came back from Atlanta I think it was the first of October, they cut us off about the fifteenth of June I think, that is my memory, I do not remember exactly.

Cross-examination.

Mr. Candler did not have any particular objections to Koke except that it was being sold at the fountains as a competitor, is all that I know. He regarded it as a substitute or an infringement. That word Koke was a substitute, a familiar nickname for Coca-Cola and on the ground that he objected.

Q. And it is a matter of common knowledge, isn't it in this section of the country that it is a common nickname for Coca-Cola?

Mr. LITTLETON.—We object to that form of the question because it is leading and because it is wholly outside of the direct examination, and in asking that question the counsel makes the witness his own witness and we object to it as leading.

(Deposition of T. D. Culbreath.)

Objection overruled and appeal prayed and granted.

A. Yes, sir. [1273]

Deposition of J. G. Van Winkle, for Defendants.

J. G. VAN WINKLE.

Direct Examination.

Twenty-seven years of age; live in Dallas, Texas; lived here about 12 years; engaged in manufacturing business. At the present time I am not engaged in anything but the jobbing business. I was connected with the Koke Company of Texas as Secretary of the Company. The Koke Company of Texas was selling Koke. I became connected with that company January 1, 1912. The Koke Company of Texas advertised their product that they were selling, Koke. (Paper marked Defendants' Exhibit No. 122.) They are three ledger sheets out of our ledger of the Koke Company of Texas. They show sums expended for advertising which we purchased. The first item on sheet #1, February 8, 1912, match safes, E. M. & Co., \$42.50 is for some little novelties.

Mr. ROGERS.—These sheets are objected to as not properly proven.

Objection overruled.

Match safes.

Mr. ROGERS.—What were those match safes advertising?

A. Koke.

Q. Do you remember what they had on them?

(Deposition of J. G. Van Winkle.)

Mr. ROGERS.—I object to that as secondary evidence.

Objection overruled.

“The compliments of the Koke Company of Texas, Dallas, Texas,” as I remember and on the reverse side it had “Koke, the ideal drink.” I have none of them, we gave them away to friends, soda jerkers, druggists, anyone that happened to ask for them. All on that is for advertising the money which was expended to buy advertising with, the articles mentioned therein were purchased by the Koke Company of Texas, they were used in advertising this product. There is an item on there showing where we advertised in the “Dallas News,” a newspaper in Dallas, Texas. That is on sheet #3, Feb. 5, 1913. That was the date the bill was paid. The kind of advertisement was a New Year’s card. The ledger sheet shows tickets, quite a number of places for instance, Angus Young tickets \$3.35; Dallas, tickets \$5.80; Texas Drug Company, tickets \$2.70 and a whole line of names of that sort, were free coupons [1274] entitling the holder of it to a drink at a soda-fountain where our product was served and the tickets were turned in by the different dispensers and we in turn cashed them under the contract embodied in that ticket. (Ticket marked Defendants’ Exhibit #183.) That is one of the tickets referred to. On this statement from the Skeg Printing Company (marked Defendants’ Exhibit #184) at the fourth item on that statement is for ten thousand cards, \$47.50, that was the bill for the cards, Exhibit

(Deposition of J. G. Van Winkle.)

#183. The invoice for those tickets we distributed throughout Dallas and surrounding territory, practically 10,000 of these tickets. How many we redeemed I am not in a position to say. The larger percentage of them I should say.

Mr. ROGERS.—I object to that and move to strike the answer out, it is obviously the conclusion of the witness as he has no actual knowledge of the subject.

Objection overruled.

I attended to the fountains and drug-stores in redeeming these tickets. (Paper marked Defendants' Exhibit #185.) That is an advertisement of the Coca-Cola Company which I clipped from the "Dallas Times-Herald" of issue September 10, 1913. (Paper marked Defendants' Exhibit #186.) That is an advertisement of the Coca-Cola Company which I clipped from the "Dallas Morning News" of issue September 4, 1912. (Defendants' Exhibit #187.) That is an advertisement of the Coca-Cola Company clipped from the "Dallas Morning News." I clipped that dated August 30, 1912. (Defendants' Exhibit No. 188.) That is April 24th, 1912 edition of the "Weekly Pitchfork." On the back page of that paper is a Coca-Cola advertisement. (Defendants' Exhibit #189.) I judge that is a bottle of lemon sour. It is put up in a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works, Dallas, Texas. I purchased it on May 3, 1914 from the wagon of the Coca-Cola Bottling Works, Dallas, Texas. I identify that as the bottle I purchased because it has the original

(Deposition of J. G. Van Winkle.)

label which I pasted on the bottle at the time I purchased it. (Defendants' Exhibit #190.) That is a bottle of [1275] lemon sour soda water contained in a bottle with the name Coca-Cola blown in the glass. That was bottled by the Coca-Cola Bottling Works, Dallas, Texas. I purchased it on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. (Defendants' Exhibit #191.) That is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works of Dallas, Texas. I purchased that on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. Defendants' Exhibit #192 is a bottle of "brew," a bottle with the name Coca-Cola blown in the glass, bottled by the Coca-Cola Bottling Works, of Dallas, Texas. I purchased it from a Coca-Cola Bottling Works wagon on May 3, 1914. Defendants' Exhibit #193 is a bottle of strawberry soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased it from a wagon of the Coca-Cola Bottling Works on May 3, 1914. Defendants' Exhibit #194 is a bottle of lemon-sour soda water contained in a bottle with Coca-Cola blown in the glass purchased from a wagon of the Coca-Cola Bottling Works May 3, 1914. Defendants' Exhibit #195 is a bottle of "Brew" contained in a bottle with the name Coca-Cola blown in the glass I purchased from Heeder's Stand, 316 South Hallwood Street, May 9, 1914. I asked the dealer from whom I purchased it, where he got it.

(Deposition of J. G. Van Winkle.)

Q. Where did he get it?

Mr. ROGERS.—Objected to as hearsay.

Objection overruled.

From the Coca-Cola Bottling Works. Defendants' Exhibit #196 is a bottle of "brew" I purchased from the stand of Heeder's, 316 South Hallwood Street, May 9, 1914, and it is contained in a bottle with the name Coca-Cola blown in the glass. I asked him where he got that bottle, and he said he bought it from the Coca-Cola Bottling Works.

General CRANE.—That is objected to as hearsay.

Objection overruled.

Defendants' Exhibit #197 is a bottle of sweet-lemon soda water contained in a bottle with the name Coca-Cola blown in the glass. I bought it from Mr. Heeder's stand, 316 South Hallwood Street, Dallas, Texas, [1276] May 9, 1914.

Q. Did Mr. Heeder say where he got that bottle?

A. From a wagon of the Coca-Cola Bottling Works.

General CRANE.—That is objected to as hearsay.

Objection overruled.

Defendants' Exhibit #198 is a bottle of lemon soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased this May 6, 1914, from Marquet's stand.

Q. Did you ask Mr. Marquet where he got that bottle?

Mr. ROGERS.—That is objected to as hearsay.

Objection overruled.

I did. He said he got it from The Coca-Cola Bot-

(Deposition of J. G. Van Winkle.)

tling Work's Wagon. Defendants' Exhibit #199 is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass. I purchased this from a wagon of the Coca-Cola Bottling Works on May 3, 1914. Defendants' Exhibit #200 is a bottle of strawberry soda water purchased May 9, 1914, from Heeder's Stand, 316 South Hallwood Street, contained in a bottle with the name Coca-Cola blown in the glass. Defendants' Exhibit #201 is a bottle of lemon-sour soda water contained in a bottle with the name Coca-Cola blown in the glass. It was purchased by me on May 3, 1914, from a wagon of the Coca-Cola Bottling Works. Defendants' Exhibit #202 is a bottle of lemon-sour soda water contained in a bottle with the words Coca-Cola blown in the glass; I purchased it from Heeder's stand at 316 South Hallwood Street, May 6, 1914. Defendants' Exhibit #203 is a bottle of strawberry soda water purchased at Mr. Marquet's stand, May 6, 1914, contained in a bottle with the words Coca-Cola blown in the glass. Defendants' Exhibit #204 is a bottle of strawberry soda water with the words Coca-Cola blown in the glass; I bought it from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914. Defendant's Exhibit #205 is a bottle of strawberry soda water with the words Coca-Cola blown in the glass which I purchased from Heeder's Stand, 316 South Hallwood [1277] Street, Dallas, Texas, May 6, 1914. Defendants' Exhibit #206 is a bottle of lemon-sour soda water contained in a bottle with the words Coca-Cola blown

(Deposition of J. G. Van Winkle.)

in the glass, bought from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914. Defendant's Exhibit #207 is a bottle of strawberry soda water contained in a bottle with the words Coca-Cola blown in the glass which I bought from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 6, 1914. Defendants' Exhibit marked #208 is a bottle of sweet-lemon soda water contained in a bottle with the words Coca-Cola blown in the glass. I purchased it from Heeder's Stand, 316 South Hallwood Street, Dallas, Texas, May 9, 1914.

Q. Now, state whether or not the bottles which you purchased from the dealers if you asked them where they got the bottles in each instance.

A. I did.

General CRANE.—That is objected to as hearsay.

Q. What was their reply?

A. The Coca-Cola Bottling Works' wagon.

General CRANE.—You will please note the same objection.

Objection overruled.

I identify the bottles by the labels attached to them; I put the labels on them when I purchased them. (Defendants' Exhibit #209.) That is a bottle of Coca-Cola that came from the Austin Bottling Works, Austin, Texas. Defendants' Exhibit #210 is a bottle of Coca-Cola that came from *August* Bottling Works, Austin, Texas. Defendants' Exhibit #211 is a bottle of Coca-Cola bottled by the Jacksonville Bottling Works, Jacksonville, Texas. Defendants' Exhibit #212 is a bottle of Coca-Cola

(Deposition of J. G. Van Winkle.)

bottled by Jacksonville Bottling Works, Jacksonville, Texas. Defendants' Exhibit #213 is a bottle of Coca-Cola bottled by the Coca-Cola Bottling Works, Rockwood, Tennessee.

The Koke Company of Texas is not now selling Koke, they quit; they could not sell the goods on account of suits, from the Coca-Cola Company and its representatives.

Mr. CRANE.—We object to that as hearsay.
[1278]

Our customers wrote us letters advising us of that fact. Defendants' Exhibit #214 is a letter dated Fort Smith, Arkansas, October 24, 1914, addressed to the Koke Company of Texas, Dallas, Texas, signed by John Schappee Drug Company. I received that letter in the due course of mail. Our customers declined to handle Koke on account of threats from the Coca-Cola Company and representatives of the Coca-Cola Company. That fact was made known to us through the mail direct from these different parties and through our agents. Jobbers who had been there before jobbing Koke refused to sell it any longer, stating that they had been threatened by the Coca-Cola Company.

Mr. ROGERS.—That is objected to as hearsay.

Objection overruled.

That if they did not refuse to stop handling our product they would be cut off from the supply of Coca-Cola.

Mr. ROGERS.—I move to strike the answer out as hearsay.

(Deposition of J. G. Van Winkle.)

Motion overruled.

The Koke Company of Texas surrendered their license from the Koke Company of America to sell Koke, surrendered it to J. C. Mayfield, President of the Koke Company of America. That was done January 1, 1915.

Cross-examination.

The Koke Company of Texas has not gone out of business; we are not shipping Koke. The last shipment was prior to January 1, 1915. We have shipped none since January 1, 1915. I could not say the exact date the last shipment was sent without looking up the record. I judge right at the 31st of December, though. We have had complaints from our customers, or the customers of the Koke Company of Texas that agents and representatives of the Coca-Cola Company had "bull-dozed" them. I have received letters stating that fact. I am not prepared to state the exact number; quite a good many of them. I turned them all over to Mr. Mayfield, J. C. Mayfield, as I received them; I do not know the first date; maybe from October or November, 1914. I judge letters have been received since the date of the one offered in evidence. [1279] Everything received up to that time has been turned over to Mr. Mayfield but this one letter here. I turned this over to him also. I should judge this is the only one that has been produced, that is the first time I have seen it since I referred it to Mr. Mayfield last Fall. Mr. Littleton just then handed it to me.

(Deposition of J. G. Van Winkle.)

Mr. ROGERS.—Have you the rest of those letters, Mr. Littleton, all of them or any of them?

Mr. LITTLETON.—I am not on the stand.

Mr. ROGERS.—I know, but I am asking you if you have any of them.

Mr. LITTLETON.—I am not on the stand; you cannot ask me.

Mr. ROGERS.—I wish the records to show that counsel requests Mr. A. B. Littleton to produce the letters referred to by the witness; you decline to produce them.

Mr. LITTLETON.—I do not say whether I have got them or not; I am not on the stand.

Mr. ROGERS.—Will you produce them?

Mr. LITTLETON.—I will produce the letters when the time comes.

Mr. ROGERS.—We want them now.

Mr. LITTLETON.—I am not on the stand and do not want to introduce them. I do not want any of your detectives to find out the witnesses I have got, and get to them before they get on the witness-stand.

Mr. ROGERS.—I trust the records show that too, Mr. Commissioner.

The COMMISSIONER.—Yes, sir.

I began to manufacture Koke January 1, 1912. I had previously been in the employ of the Coca-Cola Company in the manufacturing department, but not altogether. I was somewhat familiar with the constituent elements of Coca-Cola. I did not know all of them. I knew its general make up, however.

(Deposition of J. G. Van Winkle.)

Mr. LITTLETON.—We object to that line of cross-examination because it is not based on anything in the witness' direct examination and because it is leading and he makes the witness on that point his witness, and is leading his own witness. [1280]

General CRANE.—In Texas the rule is the other way.

Objection overruled, and appeal prayed and granted.

I was Mr. Candler's stenographer for a part of the time and wrote his letters.

Q. You knew that the Coca-Cola Company was having difficulties with substituting, did you not?

Mr. LITTLETON.—I object to that same line of cross-examination for the same reason as heretofore stated.

Objection overruled and appeal prayed and granted.

The WITNESS.—Shall I answer the question?

Mr. LITTLETON.—Go ahead and answer the question.

A. I' did.

Q. You know that the Coca-Cola Company regarded the name Koke as a nickname for Coca-Cola?

Mr. LITTLETON.—We object to that for the same reason as heretofore stated.

No, I never heard that discussed.

Q. Well, if you did not hear it discussed you knew that the Coca-Cola Company regarded the name Koke as an abbreviation for Coca-Cola?

(Deposition of J. G. Van Winkle.)

Mr. LITTLETON.—We object on the same ground, that he is making the witness his own witness on matters not touched upon in the direct examination.

Objection overruled and appeal prayed and granted.

A. Why the Coca-Cola Company was selling Coca-Cola they were not selling Koke.

Q. What was your object in putting in this advertisement from the "Dallas Times" of September 10, 1914.

Mr. LITTLETON.—We object to that question. The witness did not put it in. It was put in by counsel and the witness has no object one way or the other.

Objection overruled and appeal prayed and granted.

I cut it out because I deemed it was unfair advertising, it was knocking us, the Koke Company, in this particular advertisement which has been offered in evidence as #185, that was in support of the arguments of their traveling men. It struck me as a knock in that direction the minute I saw the advertisement. The product of the Koke Company of [1281] Texas in this section has always been sold under the name of Koke, never under the label Dope. I have a few specimens of advertisements that are referred to in these sheets called ledger pages. I have not brought them in, I do not know where they are, I have not any to produce. February 8, 1912, is not the date when our advertising began, that is when

(Deposition of J. G. Van Winkle.)

we paid for the item, we bought it in January, and paid for it in February. and these bills, these items, here represent the dates of payment. This advertising is all advertising of Koke, and none of Dope. Some of the other Koke companies use it, that is my understanding. All of these bottles that I have recognized here as Coca-Cola Company's bottles, except the Coca-Cola—except the "brew" is an entirely different color from Coca-Cola. The "brew" is stamped on its crown "brew." The Koke Company of Texas never had a barrel sent back because it was supposed to be sour, I am sure of that, there was no Koke sent back from Fort Worth on the ground that it had soured at any time. I think I know what barrel you have reference to coming back from Fort Worth, it was not the quality of the syrup, it was the container. It was a root beer barrel we had bought in the open market previously containing root beer, painted and sold by us in the factory and the man filled it with our syrup, painted, labeled it and shipped it out. Of course a root beer barrel is a clear barrel and the wood had absorbed some of the acid. When our syrup was put into it it took up that acid and flavored it, of course. We usually use Koke barrels. We try to buy second hand barrels, any kind that suit the requirements. We would buy Coca-Cola barrels and do. I think about 25 per cent were Coca-Cola barrels. The rest of them were general barrels, new barrels, 25 per cent were new barrels. We would use some whiskey, not charred though, we would use coined whiskey barrels, clear

(Deposition of J. G. Van Winkle.)

barrels. We bought a good deal of our stock from the Dallas Cooperage Company and other manufacturers. We cleaned them up and painted them red and sent them out.

Mr. LITTLETON.—I want to tender and offer in evidence as [1282] Defendants' Exhibit #181 to 213, I think that is all, as evidence on behalf of the defendants in the above-entitled causes. We did not put a label on the barrels when they are shipped out, none other than our shipping tag, that is a little square tag that is packed on, it is about 2 by 5 inches made out of cardboard. It has a blank for the address and from the Koke Company of Texas, Dallas, Texas, and generally in one corner we put the gauge and contents. Gauge of the barrel is quantity, contents of the barrel, quantity of syrup. This had been our method of marking the barrels from the beginning up until the time it stopped on January 1, 1915.

Redirect Examination.

I remember a call on us by an advertising agent of the "Dallas News," I think his name was McClean. In the course of that conversation I did not tell Mr. McClean that the Koke Company of Texas was not doing any advertising. There were others in the office when that gentleman called. The young lady stenographer was there. The Koke Company of Texas never painted the barrels a different color during the time they were in existence; they painted them the same shade all the time.

Deposition of J. G. Davis, for Defendants.

J. G. DAVIS.

Direct Examination.

I am 49 years old; live in Dallas, Texas. I am engaged in the wholesale drug business. The name of my concern is the Greiner-Kelley Drug Co. I am Secretary and Treasurer. Our concern dispenses and sells by the wholesale syrup for making cola beverages. We handle Dr. Pepper, Coca-Cola, Jersey Creme. I think that is about all; maybe some others. We did handle Koke made by the Koke Company of Texas, I cannot remember just the date, it has been, I presume about 3 years ago. We were handling Coca-Cola at that time also. We are not handling Koke now, we quit handling Koke because the Coca-Cola Company declined to sell us if we handled Koke. I have had conversations with persons connected with the Coca-Cola Company, I had a conversation with Mr. Candler, D. B. Candler, sitting here with counsel for complainant. As near as I can recall it, Mr. Candler called me over the phone and asked me if [1283] we were handling Koke and I told him that we were accepting orders for Koke from our customers, that we were not carrying it in stock, and he said then, if that was a fact he could not sell us Coca-Cola, and I asked him to come over and talk to me about it and he said there was not anything to talk about and the conversation—well, I also asked him if our account was satisfactory otherwise and he said that it was but that he

(Deposition of J. G. Davis.)

would not sell anybody that sold Koke, and I hung up the phone then, and about the next day or the day after we phoned him an order for I think 10 gallons of Coca-Cola and he declined to fill the order and I went to the phone and called him up again and he said, "I told you the other day that we could not sell you Coca-Cola if you handled Koke." Then it was a question of business policy with us, as we could not handle both accounts we took the one that we considered the most profitable to us, and I went over and saw Mr. Candler. I had a personal conversation with him and I told him that I would not handle Koke any more and he then began to sell us Coca-Cola and has sold us ever since we have not handled Koke. I called up Mr. McCarty Moore, I believe is the gentleman's name, who represented himself as the head of the Koke Company and told him the circumstances and that we could not handle Koke. I had a few unfilled orders, orders that were to be shipped out at later dates, that had not been executed and I returned those to him. I have always recognized Mr. Candler as manager of the Dallas branch of the Coca-Cola Company. I do not know whether that is correct or not.

Cross-examination.

Mr. Candler advised me during those interviews that Koke was an abbreviation of Coca-Cola, something of the kind that the Koke Company was taking advantage of that for the purpose of imposing on its customers. I do not know what it was. Mr. Cand-

(Deposition of J. G. Davis.)

ler did not object to my selling Dr. Pepper's drink, nor any other soft drink; he objected to Koke for the reason that he thought it infringed on his trademark, that it was being substituted for his goods, that was the idea I got. [1284]

Redirect Examination.

I could not tell just the conversation, just the words that he used, it has been so long, but as I told General Crane there, I had the idea that his objection was that they were unfair or infringing or an infringement on the Coca-Cola Company, something of that kind, but I cannot tell just the words he used.

Recross-examination.

I am not prepared to say it was a reasonable suggestion to me.

Deposition of Dr. J. G. Pyle, for Defendants.

Dr. J. G. PYLE.

Direct Examination.

I am 57 years old; live in Dallas; have lived here since '93. I have been in the drug business the principal part of the time; I have been out of the business a time or two. I am engaged in the drug business now; the name of my concern is Rogers-Pyle Drug Company, that is Cecil V. Rogers, we have a corporation in which we control the stock. We did business in Dallas, Texas, under the name of the Palace Drug Company. At that time we had in our employ D. P. English, I think he worked for me once, he is a prescription man. I never saw him dispense any,

(Deposition of Dr. J. G. Pyle.)

if he did it was while I was out. He never did any of it. I always kept a couple of soda men and if he ever dispensed any, I did not know it. We dispensed Koke, the product of the Koke Company of Texas, a couple of years, I guess, 2 or 3 years, I do not remember the time. It was in 1912 and 1913, I do not know whether I handled any in 1914 or not, I think I did a little.

Q. 19. Did a representative of the Coca-Cola Company ever call on you?

A. Oh, yes; sure.

Q. 20. Who was that?

A. Why Mr. Boyd I think represented them.

Q. 21. The Coca-Cola Company?

A. The Coca-Cola Company, I thought you said the Koke Company.

Q. 22. Yes.

I think Mr. Harris used to come around occasionally; he came in there one day and talked about handling Koke. He said I was infringing [1285] on the Coca-Cola people. I said I did not see why. He said, well, you know when a man calls for their Koke he means Coca-Cola. I said I do not think so; if a man calls for Koke I give him Koke; if he calls for Coca-Cola I give him Coca-Cola; and he got kinder machy about it and made me sore and we had a few words and that was about all there was to it. He intimated that he was going to make me quit handling Koke or something like that. I do not remember [1286] just how he did put it now; it has been

(Deposition of Dr. J. G. Pyle.)

two or three years ago and I have hardly thought of it since. We had a few words there and I told him to get out of the house. I did not want a man to come around dictating to me what I was selling. I did not propose for him to do so what I would sell, that I carried both Coca-Cola and Koke and give a man what he called for. I did not propose that he should say that I should sell either one or should not sell either one. That is about all and about the way it wound up. He said something to the effect that he would not sell us Coca-Cola if we continued to sell Koke. I just inferred that he would not and for that reason I never ordered any more for awhile. I inferred that he would not sell me any from the way he talked, but I do not remember just what the words were now. I just knew him as Mr. Harris, representing the Coca-Cola people. I never met him except on such occasions when he called on me. He lives here in Dallas, I think. I gave the dispensers instructions with reference to the sale of Koke and Coca-Cola. I had several compartments to keep it in and I told them if they called for Coca-Cola to give Coca-Cola and if they called for Koke to give them Koke. I never told any of our dispensers to substitute Koke when Coca-Cola was asked for. I never told D. P. English to substitute Koke when Coca-Cola was asked for, because I never thought he had anything to do with the Coca-Cola business. I do not suppose he ever drew a drink unless he did it for himself, sometimes those fellows will draw

(Deposition of Dr. J. G. Pyle.)

their own drinks but I never did know him to sell a drink of any kind. He may have done it sometimes but it was not his business to do it. None of our dispensers, or D. P. English or anyone else connected with our establishment during the time we were handling Koke ever sold Koke when Coca-Cola was asked for to my knowledge. I never heard that they had done so. I always instructed them not to do it, if they did it they did it against my instructions. They may have carelessly done so some time but I never knew about it if they did. The Koke Company of Texas gave out tickets all over town for distribution, and they would bring them into me for drinks. None of our soda [1287] dispensers ever complained to me that the trade would not drink this product Koke and did not want it. There was about a week or two there I think, that I did not have any Coca-Cola, after Mr. Harris rounded me up so, I never ordered any more then for awhile and I think I got out for a week or two, I don't remember the exact length of time, I know I was out a little while, and during that time I told the boys to tell them that we did not have any, that we were out. So far as I know they followed my instructions but you cannot tell about a soda boy, they may do anything. It seems to me like it was 600 gallons of Coca-Cola I bought in 1913. I could not say that I know anything of my own personal knowledge about the Coca-Cola representatives going to soda dispensers dispensing Koke and getting them to knock it, but I have known of it. All I ever heard about it is hear-

(Deposition of Dr. J. G. Pyle.)

say. These tickets that were for Koke that were handed in at our soda-fountain by customers were later redeemed by the Koke Company. I have heard this word Koke applied to a soda-fountain beverage 8 or 10 years. The first time I ever heard the word Koke I was in West Texas, I think it was about 1904 at Albany, Texas, and I went and asked for Coca-Cola. They said we have not got Coca-Cola. I said, What have you got? He said, Koke. I said, What is Koke? He said, Well, it is something similar to Coca-Cola. I asked him to give me a Koke and he drew a Koke. That was the first time I remember of ever hearing it. Since then the word, I have frequently heard it but I never paid any attention to it.

Cross-examination.

I do not remember the name of the store in Albany that I refer to; just a cold drink stand. I was never there before and have not been since. It was just a drink stand, a kind of little confectionery stand. They drew the Koke out of a keg, a 5 gallon keg. He told me at the time where it came from. He said it is made over there, at some small town, maybe Cisco, something like that. I do not say it was Cisco, it was some little town out there, it is not far from there, is what he told me. I do not remember whether there was a label on the keg. At that time I was in the soda business and the word, I just heard it in the store. [1288] I had talked about Koke, fellows drinking Koke and so on and being great Koke drinkers. I do not know what drinks were referred

(Deposition of Dr. J. G. Pyle.)

to in that connection. I never had handled anything called Koke at that time, they may have been talking about Coca-Cola, and may have been talking about Koke. It might be possible and very probable a lot of people may call for Coca-Cola when they call for Koke. Maybe some shorten the name into Koke. I instructed my boys when we handled both if they call for Koke to give Koke and if they call for Coca-Cola to give Coca-Cola. I never did hear anyone kicking about it. If they wanted Coca-Cola and drank Koke they did not object. I tell them to do that because I never could tell the difference. I only handle Coca-Cola at our store now. The boys know we handled Coca-Cola and give Coca-Cola. I guess we do not give Koke because we do not handle it. The customers have not kicked. I handled the product of the Koke Company of Texas since they started this factory, the last 2 or 3 years. I had been out of business up to that time for 3 years and before I went out of business 3 years, which was in 1907, we used to handle Coca-Cola then. I used to be in business, we used to buy a stuff from Atlanta, something like it, it was called Cola-Ade. We mostly handled Coca-Cola those days. I do not remember when the name Koke got to be used. You hear it oftener the last few years than you used to. I cannot tell just when it come in. I do not remember when it started only I just remember that was the first time I heard it, it was at Albany and I might not have heard it called Koke, you know, at that time.

(Deposition of Dr. J. G. Pyle.)

There used to be a lot of talk about cocaine in Cola-Cola and people used to ask if it had cocaine in it, and that stuff. People would be talking about Coca-Cola and when that fellow—the reason I remember it, the reason I told him that, I said is it made out of cocaine, of course I knew it was not. I asked that to see what he knew about it and just by him calling it Koke I got that answer just to see what he would say. He said he did not know what it was made out of, of course he did not. He was just a confectionery fellow. He did not know what he was serving, he might have thought [1289] he was serving Coca-Cola. The time I was at Albany and had this experience with the product made at Cisco, was in September or October, 1904, as well as I can remember. My wife's people are out there and I was out there on a visit. That was the only time I was there, I know it was either 1904 or 1905. I think it was about the 1st of October. I was at that time in the drug business and had been about a year before and was handling Coca-Cola at our fountain. I do not know whether Coca-Cola was called Koke in 1903 or not. I never had heard it called Koke up to that time I was out there. I am satisfied of that, but the name is used more and more up till this day; it is used more now than before. A man calls for Koke and lots of times now I do not know whether he means Coca-Cola or Koke. Before the Koke Company of Texas started in Dallas, it is possible—I say it is not improbable, that they

(Deposition of Dr. J. G. Pyle.)

did call Coca-Cola Koke at that time; they may have done so. Before I bought anything from the Koke Company, I think I heard Coca-Cola called Koke, I could not say, I could not call any certain time when it was called Koke. I cannot remember when I ever heard it called that. As a rule you know a man calling for it I could say but I went out of business from 1907 to 1910. When we were handling this product of the Koke Company of Texas, we had two sections, two fountains, and we would keep the Coca-Cola there generally labeled, keep the Coca-Cola in a Coca-Cola label and the other keep it in some other label. We did not have any label made with the fountain for Koke. I think they kept it in simple syrup as well as I can remember. Koke syrup costs us less than Coca-Cola. I think I paid a dollar and a quarter for that and a dollar and a half for Coca-Cola, and the drink sells to the consumer at the same price, 5 cents a glass. If our dispensers mix them up they did not tell me, and they had instructions on that. There is no occasion for them not to know where the syrups were, no reason that they would not know what they were drawing when they drew it. If they gave Koke for Coca-Cola they knew that they did it. I did not label the fountain container that contained the syrup of the Koke Company of Texas. The label comes in [1290] a kind of little white marble something, in there you know with the name on it and I had no object in changing that, no occasion to do it absolutely. It would not be diffi-

(Deposition of Dr. J. G. Pyle.)

cult for the soda man to know which he was serving. I cannot tell the difference either in taste or appearance of Koke and Coca-Cola. The man who came in and asked for a Koke was served with the product of the Koke Company of Texas. That is what I instructed my boys to do. Of course I could not stand there and watch them and see what they were serving. I took it they did what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. They could have mistaken one for the other if they had been side by side and no labels on them. They could have gotten them mixed up, but we were very careful not to get one in the other; there was no reason to do so. Mr. McCarty Moore was not interested in the Palace Drug Company that I know of, and I owned it and I guess I know. I was never interested in the Koke Company of Texas, except in some stock I got from them on the purchases of Koke from them. I got the stock on the product that I handled.

Redirect Examination.

The reason I do not handle Koke now is when we went into business there my partner said he wanted to handle Coca-Cola. I told him to go ahead and use his own pleasure about it. That is Cecil V. Rogers. I think he is a good friend of Mr. Harris the Coca-Cola man.

GENERAL CRANE.—That is objected to.

(Deposition of Dr. J. G. Pyle.)

Objection overruled and appeal prayed and granted.

I have never seen Mr. Harris but twice, I think, since we formed the partnership. When we first started again up on Ross Avenue he was in there one day and then he was in the store once since we have been up there.

Recross-examination.

I cannot say for sure whether we ever had any advertising of the Koke Company of Texas in or about our fountain or store. It seems like we [1291] had some little cards about like those printed and set up on the fountain. I am not positive but since you said that, I believe we did.

Deposition of L. W. Ozier, for Defendants.

L. W. OZIER.

Direct Examination.

I am 33 years of age; at present I am here in Dallas, Texas. (A bottle marked Defendants' Exhibit #215.) I bought that bottle from a dealer in Waco, Texas, I do not know his name. I did not take any particular pains to get his name. I just went in there and got a drink. I noticed the case there and I just picked up, I think, about 8 of them, I picked up 8 and bought the whole business, 40 cents, I think, or 50 cents. He charged me 10 cents apiece for them because I kept the bottles. I asked him who he got them from.

General CRANE.—That is objected to as hearsay. And he said the Coca-Cola Company, Bottling

(Deposition of L. W. Ozier.)

Company, Waco, Texas, and it was so labeled on the case. (A bottle marked Defendants' Exhibit #216.) I got that bottle at the same time I bought the others, they came out of the same case. (A bottle marked Defendants' Exhibit #217.) That belongs to the same bunch as #215 and #216, purchased at the same time and place and from the same party out of the same case. (Bottle marked Defendants' Exhibit #218.) I bought this from a bottler at McKinney, Texas, not the bottler, but a dealer at McKinney and asked him at the time who bottled it and he told me Mr. Crouse.

General CRANE.—That is objected to as hearsay.

Objection overruled and appeal prayed and granted.

He told me Mr. Crouse was the proprietor of the Coca-Cola bottling plant. The name on the case that bottle was in was the same name as the bottle, Coca-Cola Bottling Company, McKinney, Texas. (Bottle marked Defendants' Exhibit #219.) This was purchased at the same time that I purchased #215, #216 and #217; that is a bottle of chocolate soda water. (Bottle marked Defendants' Exhibit #220.) There is a stand just above the Interurban Depot at McKinney, it was rather warm and a friend of mine, I do not remember his name, he said, "Let's go and get a drink." I said, "Of course we will do that." We walked up to this little stand [1292] and I asked for a bottle of Coca-Cola and he gave it to me all right and I happened to see this sitting up on top of the counter. I asked him what that was.

(Deposition of L. W. Ozier.)

He said it was labeled. I looked at it and I noticed it is Iron Brew and I bought it from him, paid him a dime for it. I did not ask him where he got it. (a bottle marked Defendants' Exhibit #221.) I bought this from the same old fellow, I bought the 215, 216, 217 and 219 at the same time. (A bottle marked Defendants' Exhibit #222.) I bought this one at the same time I bought #220, bottled by the Coca-Cola Bottling plant at McKinney, Texas.

Mr. LITTLETON.—I tender and offer in evidence Exhibits 215 to 222, inclusive, as evidence on behalf of the defendants in the above-styled causes.

Mr. ROGERS.—They are objected to as irrelevant, incompetent and in this connection I wish it understood that the same tender with respect to Exhibits #189 to 213 are rejected too for the same reason.

Objection overruled and appeal prayed and granted.

Cross-examination.

I was formerly a salesman for the Koke Company of Texas. All of that stuff that I exhibited there cannot be any way that they could be identified unless they specified by the crown except the Iron Brew. They cannot be mistaken for Coca-Cola unless the crown is pulled off, and if the crown is taken off you could distinguish them by sampling. I did not ask for Coca-Cola, I just saw them labeled one thing and the bottle showing another. The Coca-Cola Company was using the Coca-Cola bottles for other drinks except Coca-Cola. Exhibits #221, 217,

(Deposition of L. W. Ozier.)

222, 218 and 215 are of a different color from Coca-Cola, you cannot mistake them by color. This chocolate, knowing the colors as I do, of course, it is not as light as Coca-Cola, it has on it a crown marked Chocolate. Exhibit #216 is marked on the crown "Grape." #220 is printed on the crown, "Iron Brew," Iron Brew, nonalcoholic. There is no such words printed on the Coca-Cola crown on Coca-Cola bottles. [1293]

Deposition of O. T. Maxwell, for Defendants.

O. T. MAXWELL.

Direct Examination.

I am 56 years old; I live in Fort Worth, Texas. Engaged in the wholesale drug business. The name of my concern is Maxwell-Clark Drug Company. This is a corporation. I am President and General Manager. We handled a syrup for making a soda-fountain beverage known as Koke. We began to handle that product quite a number of years ago, I suppose 5 or 6 years ago. When I first began to handle it I got it there in Fort Worth. J. C. Mayfield was making the syrup then. We have continuously handled it since then, or jobbed it. We have jobbed mighty little of anything else recently. We used to sell Coca-Cola quite extensively. We sold Coca-Cola contemporaneously with the sale of Koke. We had a call or communication from the Coca-Cola Company with respect to our handling this product Koke. I cannot remember the dates exactly, it was possibly two or three years ago we had—to begin

(Deposition of O. T. Maxwell.)

with we handled Coca-Cola ever since we established the business there. About 2 or 3 years ago we were notified that our orders would not be filled if we continued to handle substitute goods. I feel sure of their meaning Koke to be a substitute for their product. We were notified by the Coca-Cola people. When the matter first came up it was about the middle of the season, say July or August, and under their contract plan we had a number of our customers who had bought a barrel or two barrels up to that time of the season and to lose the amount they had bought would mean a loss in their rebate. I presume you gentlemen understand the rebate scheme of the Coca-Cola people. It would loose a certain amount of their rebates. I took the matter up with Mr. Candler when the orders were first refused and plead the case with him. In fact I am not so sure but what I may have misled him a little, at least I told him if he would fill those orders that I would be glad and I think I was good. But that was what he understood by my being good. He went to filling the orders and filled them during the season, the remaining part of the year. Then he notified us, did he notify us or I notify him—I would not be positive, but when the New Year came on I wanted a distinct understanding. [1294] I felt that he was entitled to it. I speak of Mr. Candler as the Coca-Cola people. I felt sure they were entitled to know just the ground we stood on and I further intimated that we would not be dictated to by any concern as to what we would sell. They were paid the spot cash for their goods

(Deposition of O. T. Maxwell.)

and we felt that we were entitled to sell goods that there was a demand for and they have refused to fill the orders and have refused to fill all orders since then. Mr. Candler refused to fill the orders for Coca-Cola. When I say I think I misled Mr. Candler, I meant really, I wanted those orders filled for the balance of that year because my customers would be at a loss and that he could take it as he darned please. I wanted him to fill those orders. After the first of the year he declined to fill our orders for Coca-Cola, simply because we had been handling Koke, that is the only reason that there could be so far as I know. We paid our account the 10th of each month following as is customary, taking our cash discount. We never had any complaint along that line.

Cross-examination.

I moved to Fort Worth in March, 1908. I moved from Cisco over there. I immediately engaged in the drug business, the name of the drug company, was originally Kendall-Clarke Drug Company, it is now Maxwell-Clarke. We began handling Koke after I went into the drug business, manufactured by J. C. Mayfield. It was manufactured first at Fort Worth. I do not know as I had ever handled any of it before. I do not know as I had ever heard of it before. I had lived at Cisco since 1883 to 1908, fifteen years. I do not think Mr. Candler based his objection to our selling Koke on the exclusive ground that Koke was a nickname for Coca-Cola and that we were thereby infringing upon their trademark of Coca-Cola. I do not know as he stated that. He

(Deposition of O. T. Maxwell.)

may have said that it was a fraudulent drink manufactured as a substitute for Coca-Cola and imposed on the public making the public believe it was Coca-Cola. We sell other soft drinks. We deal in Dr. Pepper's stuff. We deal in other soft drinks of the same kind. He made no objection to [1295] our selling any other soft drink. Dr. Pepper was never popular in Ft. Worth, there was a little sale on it, but nothing like—I did not sell as much of Dr. Pepper as I did of Koke. You are trying to get me to state what the Coca-Cola representatives objection was, I do not know his objection. I have not got the correspondence; I do not know whether I could find them, I suppose they have got them. (Carbon of the letter to the Maxwell-Clarke people and signed.) I would think that is a carbon of the letter I received. (Complainant's Exhibit #35.) I wrote this letter in reply. I think it is dated July 30, 1912. (Carbon copy of a letter signed D. B. Candler, Manager, addressed to Maxwell-Clarke Co., dated August 1, 1912.) I suppose that is the carbon copy of the letter we got from Mr. Candler in reply to our letter of the 30th. I think on the 23d of October, 1912, Mr. Candler wrote us another letter addressed to me personally as President of the Maxwell-Clarke Drug Company, this is a carbon copy. In answer to that on October 26th I wrote Mr. Candler, that is the letter. We were advised on January 3d by letter of Mr. Dan Candler that he would carry an account with us further, that is the copy of the letter. Between the time of those letters and the 3d of January,

(Deposition of O. T. Maxwell.)

this last letter, we had been taking orders for Koke, as we had been distributing Coca-Cola. I had to lie in order to get him to fill the orders. I felt I had a right to sell Koke as well as Coca-Cola. When I said I had a right to sell goods that there was a demand for, I meant that I had a right to sell Koke. Our salesmen handle it on the road, they take orders for it just like other goods, from retail drug-stores. We sell it to-day, we sell more to-day than before, we get it from New Orleans now, from the Southern Koke Company, limited. They closed the office here. I first handled it, I do not remember the year, 5 or 6 years ago, that would make it about 1909 or '10. It was made then in Fort Worth by J. C. Mayfield. The orders were turned over to us, just as many other orders, they sold the trade and turned the the orders over to our house and we filled them, they said if you will stock the goods we will give you orders just alike, for instance like the [1296] Coca-Cola boys would do, or Arrow-Cola and other things. J. C. Mayfield first came to us to interest us in selling Koke. I do not know whether I met him personally or possibly the buyer. I am not the buyer there, one cannot do it all you know. I suppose just like you would consider it, buying a drink similar to Coca-Cola, Mr. Candler thinks it is similar to Coca-Cola. Substituting is selling an article under a certain name and putting in an entirely different product. I could illustrate for instance, you take the drug line, you take Peacock's Bromidia put up by Peacock Company of St. Louis; there are other

(Deposition of O. T. Maxwell.)

preparations put up by different firms claiming to have the same result, a man would take that Peacock bottle, or a man come in and call for Peacock's Bromidia and he would take the other goods and sell it on that order, I would consider a substitute drink. Koke is cheaper than Coca-Cola. We get for it a dollar a gallon by the barrel. Coca-Cola, I suppose, is a dollar and a half with their rebate. I have not billed out any of it lately, when I billed it out it was a dollar and a half, and if you sell so many gallons you get a rebate at the end of the year. If you had sold two thousand gallons you would get twenty-five cents a gallon rebate. The price of Coca-Cola even with the rebates off is higher than the Koke to the trade. The Koke Company give no rebates. I do not know anything about that stock proposition, I have never been approached or interested in that. Koke cost us a dollar a gallon less 15 per cent, and 2 per cent for cash. Coca-Cola cost a dollar and a half and 3 per cent the 10th of the month following and then whatever rebate we could earn and we usually earned our 25 cents, that is the maximum rebate. Well, in the Coca-Cola proposition you do not get your rebate, I think they give rebates twice a year, possibly, that is provided the sales have been sufficient to justify under their plans of giving rebates, July 1st and January 1st. Anyway, we have got to carry it on, understand, anyway they work it. The other one is more to my idea of doing business. We bought what we sold and we paid for what we sold. We did not have to carry the profits or any of it to a

(Deposition of O. T. Maxwell.)

specific time of the year. It cost the retail trade, less than Coca-Cola. [1297]

Redirect Examination.

I know I have redeemed Coca-Cola but whether I have redeemed any Koke coupons or not, I do not know. I could not answer.

Mr. ROGERS.—We tender and offer in evidence as Defendants' Exhibits Nos. 35, etc., the correspondence introduced in the above exhibits.

Deposition of W. McCarty Moore, for Defendants.

W. McCARTY MOORE.

Direct Examination.

Thirty-eight years of age; reside 5015 Ross Avenue; Dallas, Texas. Lived here 6 years this coming July. I was connected with the Koke Company of Texas and the Southern Koke Company, Limited. I first became interested in the Koke Company of Texas—I am trying to refresh my memory on the exact starting point—it was about three years ago this last May that I first became interested in the Koke proposition. I had understood that there was a chemist who had formerly been with the Coca-Cola Company, or rather had formerly been a partner in the Coca-Cola business, who had been trying to compete with the Coca-Cola Company for years under various and sundry cola beverage names.

General CRANE.—We object to that as hearsay, except what he knows himself, about where he started.

(Deposition of W. McCarty Moore.)

Objection overruled and appeal prayed and granted.

I remember that I was once sent a Celery-Cola ticket and I presented it at the fountain of Smith Brothers at McKinney, Texas. I was told that they did not have the Celery-Cola but they could make a Celery-Cola by the addition of a little celery to Coca-Cola, that—that both beverages were made under practically the same formula, that the man who was making Celery-Cola was formerly interested with the Coca-Cola Company. That is my first recollection of any identity as between the two propositions, and this chemist's connection with it. I did not know him, and asked no questions whatever and when it occurred to me to become interested in a competitive business I went to Mr. Smith and inquired of him who this chemist was. And he told me that Mr. Massey could tell me, that he was interested with him here at that time in the manufacture [1298] of Celery-Cola and I looked up Mr. Massey and he told me that it was Mr. J. C. Mayfield who was making the beverage Koke in Fort Worth and it was being handled by his brother here, Mr. E. O. Massey here, at the time as his agent. I took the address from Mr. Massey and went over to Fort Worth. Mr. Mayfield, I was told, was at the time in Little Rock. Mr. Massey, I believe, wrote him that I was interested in the proposition. He showed me a large number of customers that he was selling to at the time, that was who I expressed an interest in it, I suppose.

General CRANE.—Pardon me; I don't want to

(Deposition of W. McCarty Moore.)

interrupt the witness' narrative but it is understood that those statements are objected to as hearsay.

Objection overruled and appeal prayed and granted.

Mr. Massey wrote Mr. Mayfield I was interested in his proposition and wanted to—in the meantime I think Mr. Massey told me that he had some option on Oklahoma and Mr. Mayfield wrote back to me a proposition on Oklahoma, for a sum of money, but I told him I would not be interested in Oklahoma alone but I had studied over the matter and I had a plan whereby I thought the business could be made a success along business lines, as an open and fair competitor of the Coca-Cola Company, and he wrote me then and I stated that if he would be in Little Rock for some time I would come up and see him, unless he intended to come down here soon. In the meantime, I think, his son came too, to see me, Mr. J. C. Mayfield, Jr. It was some little time, I think, possibly it might have been two or three weeks or longer, I do not remember just how long an interim between the time I first looked into the matter and the time I first went to Little Rock, but ultimately I went to Little Rock to see Mr. Mayfield. He was engaged in the business there. I examined the goods, went around to a number of fountains where he was selling it. I think he had some fifteen or sixteen customers and they all appeared to be well satisfied. Of course that interested me all the more. I made a proposition to associate myself with him and enlarge the business. He gave me what is a binder to that

(Deposition of W. McCarty Moore.)

contract, the contract covered something [1299] like fourteen states as a binder to that and I purchased outright the rights in Oklahoma and Kansas. In each of the states we would organize companies and put the business to going, Oklahoma first. I came back to Dallas and immediately took up the matter with some friends of mine, I do not remember just exactly who they were but Mr. Boyd eventually became interested with me in the proposition and I agreed to let him become an equal owner and he interested some parties and we started to organize the Koke Company of Texas here at Dallas. I am not just positive, but I think we began negotiations with Mr. Clarke about the same time. It may have been prior to the organization of the company or it may have been immediately after, but anyway, as he had a contract with Mr. Mayfield over a period of time, I am not sure whether it was one year or two years, and we finally closed the deal with Mr. Clark and gave him a thousand dollars to relinquish his contract with Mr. Mayfield, and he consenting, if he did, if we bought him out to turn over and let us have Texas on a certain basis. We closed the deal with Mr. Clark and that was the basis of the organization of the Koke Company of Texas. That is, as near as I can remember, it has been some 3 or 3½ years ago, we began something like May—that is the best I can remember. I was its president. The Koke Company of Texas has advertised its product Koke. I think the first one was a ticket, tickets were really prepared and ready for distribution, I think, even be-

(Deposition of W. McCarty Moore.)

fore any sales were made from this office, possibly, and the Ft. Worth office, when we took it over, had a ticket. I did not think them very attractive and I had an artist here to get up a design of a ticket that I thought would be a regular and constant reminder. It was a calendar, it had a calendar on the back and Koke advertisement on the face, you tear the coupon off the end and cash it and the intent was to keep that calendar in the pocket as a reminder of the fact that he had drank a Koke. (Defendants' Exhibit #95.) That is the ticket I refer to. These tickets after they were printed, a large number of them were distributed here in Dallas and we had a proposition as well as I can remember, [1300] the records will show better and more clearly than my statement perhaps, whereby with each barrel, the first barrel, the customer was furnished a blank to furnish us two hundred—I am not positive whether one hundred or two hundred names, I really think it was two hundred—I know it was, I am almost sure it was two hundred names, of his customers. We promised to send them a circular letter stating that we were enclosing them a ticket which would entitle them to a free drink of Koke at the fountain of this customer and that he also carried, in addition to Koke, which we praised in the circular letter, other articles of merchandise and something else. I would think I had some of those old circulars left on hand, I am not positive. I am not attending to the office detail work. I have never officed with the Koke Company, my office has always been separate and apart. I will

(Deposition of W. McCarty Moore.)

search and if I can find them I will produce and file them as exhibits in this case. I think we should have them for the reason they were sent in and kept in a way, as a voucher, and should be there. We advertised in publications, one of them I think was a postal guide, and, oh, I cannot recall the names of them now, but they were local Dallas publications that all business people advertise in, you know, to help some proposition along, most of them we advertised in. (Defendants' Exhibit #118.) The advertisement in there on orange colored paper is an advertisement of the Koke Company of Texas, a sample of some of the advertising they have done. Hangers, posters and things of that sort was gotten out. I think you call it a celluloid medallion, I believe you would call it, we had gotten up. They were to hang on the fountain and dispensing bottles, little souvenirs where gotten out, match-safes, knives, I recall now the company's name and address on it, and Drink Delicious Koke, something like that on them. (Defendants' Exhibit #59) is a Koke label and having my name, "W. McCarty Moore, Pt.," that label happened to be gotten up because having the exclusive right to the use of Koke the sale of Koke in Texas, we did not propose to give more than one bottler the right or privilege to sell it in a locality and we felt the necessity [1301] of having labels on the bottles to show his authority for the sale of it, and we were not experienced in the business, whatever, in the beginning and we really presumed that it was a requirement, a rule, a legal require-

(Deposition of W. McCarty Moore.)

ment, to prevent an infringement or to use a label. I gathered up a number of types of labels, I had one a square one that Mr. Mayfield had been using down here at Shreveport, I gathered up that and a number of others and I went to Mr. Shuhler here, an artist. He had previously gotten up the letter-head for the company and some cuts of various printed matter and when we came to the bottling end of the business, why, I went to him to get up a label and I submitted these different labels. It was finally decided on this type of label from the fact that we thought it would adhere to the bottle and had them printed. I mean that shape rather, and while it appears to be an almost facsimile of the Coca-Cola Company's label, and in some respect it may be, that is the wording around the border and the script name of the president. Well, it occurred to me, I asked for no advice in the matter, but it occurred to me that the Coca-Cola Company, in putting out a label and having been in the business as long as they had, they put it out under the advice of an attorney and with a knowledge of the kind of labels required to make it legal and that is why I came to put the name on there just as I did. The word Koke was put in there in as large a script as it could be printed. The line at the top and the crown at the bottom with Koke on it, and there was no intent or purpose to make a deceptive label or label that would appear to a customer that it was Coca-Cola and not Koke, the idea of getting up the label was to make it distinctly a Koke label so far as the word Koke was put in there,

(Deposition of W. McCarty Moore.)

in as large type as we could put it. I had my name signed to that label because I thought it was necessary in order to make the bottler bottle our goods and every label that we printed to advertise our goods, that was what I thought about it, and whether if we furnished that label and he put it up and *and* put that on there with the signature on it that if he used it on anything else, there was another cola beverage being sold here at the [1302] time, being sold cheaper than we were selling ours, known as Texas-Cola or Koke, something like that and also True-Cola and also to keep some check on the bottler, we furnished him so many labels and we figured out how many labels would be required to use so many gallons and we proposed to sell him the labels necessary to bottle, that is use them at the rate of about 120 labels to a gallon. As well as I can remember Mr. Mayfield gave us the address, wrote us a letter regarding the matter of cuts first about some friend of his that he stated in this letter that he had been dealing with for quite a long time, some fifteen years, something like that, it might possible be found now no doubt, the letter is on our files. We wrote to this printer and he gave us the price. We wanted a two colored label the best of my recollection is, and we wanted a label as he had been used to supplying, I presume that he knew his business, label business rather. We gave him the order, we waited a time and did not hear from them. We wrote them. He promised them as well as I can remember, but it came on up to the bottling season, we were shipping goods

(Deposition of W. McCarty Moore.)

to the bottler and we could not get them from him and had to cancel the order. I think he had gone out or changed his business. I do not know just how it was but we then took it up with the local printers here and they said if we would pay for the additional cuts required so they could run them off, a large number at a time, while they were not especially prepared for that kind of work, but they would run them off for us and in the emergency we had them run off here. I think the emergency before us was also due to the fact that we were short of crowns and the Crown Cork & Seal Company did not have them here in stock and we were only able to get a few from a competitor who had some in stock, the Crown Cork & Seal Company gave us permission to buy them from a competitor of theirs and in the emergency I think they considered that fact and they would have objected to the use of these crowns with their machines on any bottle otherwise. The reason the label happened to be printed in blue to my best recollection is that he stated that he could only print it in one of two colors, that is he [1303] was only prepared to, that is used either blue or black ink. Mr. Padgett supplied them. He was a printer in the printing business here for himself and Mr. Padgett had done work for me over a period of 5 or 6 years. I took it up with him knowing if he could not do it himself he would know where to place it. I do not know whether he did the work. He has billed us for the work and we paid him, whoever he turned the work over to I do not know about that, I do not remem-

(Deposition of W. McCarty Moore.)

ber. I do not remember what instructions I gave him if any relative to the manner he was to print the label; it was to be of the colors, so far as I remember either blue or black, I do not remember whether any color was specified or not, I really do not think so. I rather think that was a matter of what he thought he could—how he thought he could *but* turn out the job. In getting up that label, it was not our design to imitate Coca-Cola labels so as to enable our goods to be passed off as Coca-Cola. We sent some labels similar to that to the Southern Koke Company, Limited, at New Orleans, when it was organized. I received a communication from Mr. Mayfield suggesting the discontinuance of the use of that label. I was the President and he put it up to me as a suggestion that we discontinue the use of it. I did not pay much attention to it at first. Until it was called to my attention again, from Mr. Mayfield who wrote again about it. I wrote him to know his reasons for it at the time, I wrote him to know his reasons for it and he cited some cases, some decision or something that gave him a suggestion that we might be infringing by it and to be on the safe side that we should change the color as he wanted to stay absolutely away from appearances of infringement and as they were not sending them out then I told Mr. Van Winkle not to send them out any more as the Crown Cork & Seal Company was getting out a large stock of crowns and we did not feel the necessity of sending them out further. And did not send out any more except a very few as we had no orders

'(Deposition of W. McCarty Moore.)

for them then. We sent a very few to the bottlers who were bottling under our franchises. Some of the labels that were sent up to the printer were a Coca-Cola label, I think it was the Gay-Ola label, and [1304] either Jersey Creme or Dr. Pepper, my recollection is that I had some three or four and this square label that Mr. Mayfield had. I did not send them up, or rather I worked with him, we kind of plotted it out together. I told our salesman to sell Koke as Koke and to impress our customers that we *made and* that they became at the same time a stockholder as well as a customer, that the object and purpose of enlisting them as a stockholder was for the purpose of building up a cooperative business and to help us do business in the most direct way and manner. My plan and object you might state is this, I do *asked* them to instruct the customers, when you have a call for Koke give them Koke, if they call for Coca-Cola give them Coca-Cola and when a man calls for Coca-Cola ask him if you might not give him a Koke, and invariably he would ask you if there was any difference, state to him that there was. Koke was made by the Koke Company of Texas, in which you were a stockholder and of course interested in pushing it and Coca-Cola was manufactured by the Coca-Cola Company if he did not like Koke and afterwards called for Coca-Cola that he would always get what he called for at your fountain. Those positive instructions that can be verified by any number, I think, of people. I exercised no control or authority whatever over the bottlers with reference to the

(Deposition of W. McCarty Moore.)

shape, size or style of bottle that they put up this Koke in. We never handled any bottles whatever. We sold the syrup, only sold the syrup and notified the Crown Cork & Seal Company that we had contracted with this bottler or that bottler and to supply him on his orders for all crowns if they felt fit to do so, we did not sell them crowns, in a few instances we may have obtained them for the bottler, I do not remember. If any of our salesmen told any customer that they could substitute Koke for Coca-Cola or advised them that they could substitute Koke for Coca-Cola. I have no recollection of it, I did not approve of any such conduct. I never acquiesced or winked at any such conduct, in no way, shape or form. I never authorized any such conduct. I would have discharged the man if I had learned of him being guilty of it. Now as to what system the [1305] customer may have had that was a different proposition, but as I have explained to you I gave them a basis on which to put the proposition up to the customers and it was along that line that I was attempting to build up a competitive business. I wanted it to be a competitive business or no business at all, that was my idea entirely. The Reiner-Kelley Drug Company was a jobber of our product Koke, they quit jobbing Koke afterwards. As to the amount of orders which they had placed that were turned back to us, Mr. Boyd can give you, I guess nearer the exact amount than Pan Winkle or I can. My best recollection is it was something in the neighborhood of either ten thousand gallons or ten thou-

(Deposition of W. McCarty Moore.)

sand dollars of contracted business. He had some, I think 25 or 5 customers here in Dallas and Reiner-Kelley—he took those orders and turned them over to Reiner-Kelley. I think they O.K.'d most all of them, the business that he secured here in Dallas they accepted them. In regard to putting a dash of celery in a glass of Coca-Cola—I was sent a Celery-Cola ticket from Dallas, I think it was, as were also a large number of other people I presume, as a buying campaign. I presented that ticket to the fountain of Smith Brothers, McKinney, Texas, Mr. C. W. Smith, I think it is C. W., who is in the Smith's Pharmacy here in Dallas and was then the dispenser. I said “give me a Celery-Cola, Charley.” He said, “Mac, we have not got the Celery-Cola but I can make you one, you have got a ticket haven't you?” I said “yes.” He said, “well, we have not got the Celery-Cola but I can make you one.” I said, “don't go to that trouble.” He said, “that is no trouble, all I have to do is put Celery in Coca-Cola and you have Celery-Cola as both Celery-Cola and Coca-Cola used to be made by the same formula or by men who used to be in the Coca-Cola business, I am not positive, but any way it was made from this same formula and one had the addition of celery.” I know that I jollied him quite a good deal about it and I would go to the fountain and when I went to the soda-fountain after that he would ask me what I would have and I would invariably say anything but a belly-ache and he knew what I meant. Try to put celery in Coca-Cola or any other cola beverage and

(Deposition of W. McCarty Moore.)

[1306] you will find that it will colic, at least it always did me, I do not think I tried it more than once after that.

Cross-examination.

My present business is mining. I was not connected with the Koke Company exclusively. I have been in the mining business some 6 or 7 years, and the Koke business was carried on incidentally. My first connection with any of these Koke companies was about December, 1910, my business then was mining. I have been in the mining business 7 years now. I was not actively but interested in the drug business about three years ago. I was connected with the Koke Company during the time. I had never been in the drug business or had any connection with the soft drink business of any sort prior to my connection with the Koke Company. I knew of the product Coca-Cola and had known it for quite a long while, I knew it was well advertised and a popular drink and I thought in getting into the Koke Company or going into the soft drink business was to compete with Coca-Cola. The Koke Company was known as a competitor of the Coca-Cola Company and Koke as a competitor of Coca-Cola. That was what I went into the business for. Mr. Mayfield was not mentioned by Mr. Smith. The only thing I can remember is, well and distinctly, is the fact that he told me both were manufactured by identically the same formula, and Celery-Cola is made by a man who used to make Coca-Cola. When I thought of engaging in the business the gentleman

(Deposition of W. McCarty Moore.)

that directed me to Mr. Mayfield was Mr. Massey, Mr. Smith telling me that Mr. Massey was interested and could tell me who it was. That was possibly eight years ago. I thought of it a great deal for a long while before I did go into this business; in fact Massey came to me once; I had some business transactions with Massey about stock, a loan and life stock and I remember asking him how he was doing in the business and he went on to tell me of the great business it could be made. Celery-Cola it was called, that it was equally as good a drink as Coca-Cola and the name Celery-Cola made it more popular, would make it more popular, if it was handled properly, but I was not induced to go into it with Mr. Massey. I went up afterward to Little Rock. [1307] That was May or June, I think it was a few days prior to the 1st of June I went around to the soda-fountains up there and heard people asking for Koke. I had never paid any particular attention to that. Mr. Mayfield took me to a fountain showing me his goods and asked them to make a statement to me of the satisfaction it was giving. I asked about the merits of the goods and the satisfaction it had given. I presume Coca-Cola was mentioned, I could not say whether it was or not.

Q. Mr. Moore, had you ever heard anybody ask for Koke or use the word Koke at a soda-fountain prior to that time?

Mr. LITTLETON.—Now, we wish to interpose an objection because he is seeking to cross-examine

(Deposition of W. McCarty Moore.)

the witness on matter not based on the direct testimony.

Objection overruled and appeal prayed and granted.

A. Yes, sir. If you want a specific case, I remember quite well at this same fountain of Smith Brothers at McKinney, where I bought a drink quite often, several times a day. I never did drink Coca-Cola and it was just due to the fact that I had a ticket possibly, I had one glass, I never could drink it because it unnerved me so, it was not a very palatable drink. I did not drink and I did not drink Koke very much. They were handling Coca-Cola and making Celery-Cola when anyone called for that.

A. That fountain people asked for Koke. I could not say what was served to them in response to that request, it might have been Coca-Cola, I presume it was, it might have been some other cola beverage, I was not acquainted with the business and could not say. I do not suppose I have drank as much as a half dozen glasses of Coca-Cola in my life; no cola beverage agrees with me. I took those various labels to the printer and took the square label that Mr. Mayfield said he had been using at Shreveport. I took a Coca-Cola label, and I do not remember whether it was Dr. Pepper's label or Jersey Creme, I think it was one, possibly Dr. Pepper, or it might have been Pepsin, I think I had some three or four labels, I am right sure I had a Gay-Ola label, if I am not mistaken, that I won't be positive about, but I know two that I had positively, and that was the

(Deposition of W. McCarty Moore.)

square label of Mr. Mayfield's, it had Koke on it in script [1308] and the Coca-Cola label, and I think a Jersey Creme label. I discussed with him the advisability of a square label or a diamond label. The printer followed the Coca-Cola label out more closely in the Koke label than he did follow the Mayfield label. If we had made an exact fac-simile label at the time, using the work Koke on it, I for myself would not have felt I was doing it for the purpose of any infringement or deception. I here acknowledge and state I had no experience whatever. I was advised I had the right to use the name Koke. I presume the question was discussed at the interview we had with counsel, that Koke was used by the public as an abbreviation for Coca-Cola. I am pretty sure we discussed mighty near everything that was possible to discuss regarding it. I know I went very carefully into it and discussed every possible phase of it. We were advised we had no right to sell our product as and for Coca-Cola when Coca-Cola was asked for, of course, and vice versa that they had no right to sell Coca-Cola when Koke was called for. I was advised that Koke had been registered and that registration gave us the exclusive right. The Koke Company had the right to use it as applicable to the product it was marketing under that name. The registration gave that right on that registration and it was further backed up by statements that Mr. Mayfield furnished us even prior to that when we went into that with our attorney who was pretty well versed in the matter of

(Deposition of W. McCarty Moore.)

trademarks and trade rights and trade competition, so I thought, and he went back as far as he could go back in every respect regarding Mr. Mayfield's legal right to it. Mr. Mayfield furnished our attorneys opinions—his Nashville attorney's opinion, my recollection is stating his right and wherein he had never parted from his rights and also furnished us affidavits regarding his original connection with—Bloodworth Murphy, whoever it was, three or four of them when they were in with Dr. Pemberton, and a statement from this firm of attorneys to the effect that they would take the suit for his interest in the Coca-Cola Company for a percentage, something to that effect and went on to show the whys and wherefores as to his rights. That affidavit was the affidavit signed by Mrs. Pemberton. I instructed our men to tell the purchaser that he [1309] was not to sell Koke for Coca-Cola. When he called for Koke to give him Koke. I instructed our salesmen in that way because I had looked carefully into the matter of the Coca-Cola suits—the Gay-Ola competition with Coca-Cola. It was declared to be unfair for the reason that they went to the fountain people and bottlers and furnished them a substitute pure and simple, as a substitute for Coca-Cola and to be put out under Coca-Cola crowns and Coca-Cola labels. I did not propose to engage in a business of that kind. I proposed to let it be known by every body that there was a Koke and Koke trademark, and if they did not want to use and call for Koke, but to call for Coca-Cola and not Koke that was my

(Deposition of W. McCarty Moore.)

object and my aim. I would just as soon put it out under some other name, I could have done better, I guess. Perhaps it would have avoided suits that we have had brought against us and possibly ~~competition~~ ^{confusion} which has existed between Koke and Coca-Cola. I never sold any Koke to the Waco Drug Company personally, and never had any interview with anybody over at the Waco Drug Company. We had a traveling man by the name of N. L. Moore, no relation of mine, that is where the confusion might have come up. I might have sold one or two isolated cases, only when I went out on different business. The name of the drug company was Empire Drug Company, in Dallas, formerly the Thurman Drug Company; they were using Koke, however, prior to my becoming interested in the company. They had a contract with the Koke Company. Mr. Boyd obtained the contract as I remember.

Deposition of J. A. Hodge, for Defendants.

J. A. HODGE.

Direct Examination.

I am 37 years old in July. I am agent in Texas for the Illinois Glass Company. I am manager of the local store. Defendants' Exhibit #223 is a stock bottle that we carry in stock, it is not a special design made up for any particular concern, it is what we call a machine made dispensing bottle, the only form of the kind we have. We have never sold that to the Coca-Cola Company. We sold to the Jersey Creme Company in Ft. Worth and Hughes Brothers in Dal-

(Deposition of J. A. Hodge.)

las, A. M. Brown in Dallas, and sold to the various decorators for stock packages; some of the decorations that have been on there were True-Cola for Hughes Brothers; Koke for [1310] Koke Company, Howel's Orange Juice, and Grape Juice for the Jersey Creme Company. That is the cheapest thing we have, we sold some of these bottles to the Koke Company of Texas. I have a copy here of our invoice the only one we ever entered, one bill which went forward from the house on June 16, 1913. Defendants' Exhibit #224 is a carbon copy of the bill sent over at the time the shipment was made, that is a carbon copy of the bill. Defendants' Exhibit #225 is the bottle we sold the Koke Company of Texas. There is a mark on the bottle showing, it is an automatic machine made bottle, the peculiar mark at the end of the glass where it is cut off, the automatic machine makes that mark on every bottle and no other kind of bottle has that mark on it. I do not remember what was said if anything by the representative of the Koke Company when he came to purchase that bottle. I have no clear recollection of the conversation. I was sent for by some party in the Southwestern Building, I do not remember the man's name. He told me he was getting up this company and was going to use a bottle. Soon after they opened up the place and I sold them other things. I have not seen that man since. He did not tell me anything about any particular design, just the cheapest thing we had, and this as a matter of fact is the cheapest. We formerly made this bottle up by hand and

(Deposition of J. A. Hodge.)

it run as high as \$18 a gross and then when we made it by machine, machine made bottle it took off 33 $\frac{1}{3}$ % in price.

Cross-examination.

We had bottles of other shapes, but our trade is confined almost entirely to this since the machine has taken the place of workmen, making the bottles by hand, we only make this one, if I was asked about selling any other kind, I do not think I can sell any other kind of bottle.

Redirect Examination.

That condition was not true in 1913, we had other styles at that time. It was a question of price. The other styles are more expensive than those, they are hand made.

STIPULATION.

By Mr. ROGERS.—It is stipulated that the applicant [1311] and opposer may offer in evidence with the same force and effect as if duly exemplified under the laws of the United States, certified copies of the charters of the Koke Company of America, the Southern Koke Company, Limited, and the Koke Company of Texas, and that W. M. Moore and W. McCarty Moore named therein is one and the same person. It is stipulated that the matchbox produced as the specimen of the box referred to in the deposition of Mr. Van Winkle may be filed as Defendants' Exhibit #226.

Mr. ROGERS.—Said certified copies of the charters of the Koke Company of America, Southern

(Deposition of J. A. Hodge.)

Koke Company, Limited, and Koke Company of Texas are here offered in evidence as Complainants' Exhibits #41, 42 and 43.

Deposition of C. J. Thornton, for Defendants.

C. J. THORNTON.

Direct Examination.

Thirty-seven years of age, live in Hattiesburg, Mississippi. I came here in August, 1896. I am not doing anything now. The last business I was engaged in was the drug business. The name of my drug store was Corner Drug Store. I was engaged in that business from October, 1911 until January, I believe, 1915. I had a soda fountain in my drug store. I never was in the drug business before that, never operated a soda fountain, anything of that sort. I dispensed at my soda fountain a general line of all flavors and I sold Afri-Cola, Coca-Cola, Dope, Konut, Luck-Ola. I never sold any Gay-Ola. When customers came into my soda fountain and wanted a cola drink, I kept track once and '90. per cent would call Dope. When they called for Dope I gave them anything I had in the line of Konut and Gay-Ola, I mean Afri-Cola, Koke or Dope, any cola drink. When my customers came in and asked for Dope and I served them Ko-Nut Dope or Luck-Ola, I considered I was giving them what they asked for. I never had any customers refuse any drink served when asked for Dope, on the ground it was not what he asked for. The color of these cola drinks is something like the color of rootbeer, colored with caramel

(Deposition of C. J. Thornton.)

coloring, I was always told. The color of the various cola drinks compare very similar with each other, they all taste alike to me. I never saw a cola [1312] drink that was not of the same general color and taste. These various cola syrups come in red barrels and kegs. I never got a syrup or extract for a cola beverage that did not come in a red barrel or keg. I have heard people call for Dope ever since there has been a cola on the market. I have heard Dr. Pepper's called Dope. I do not know where it is made, I used to drink it and I called for it as dope. It is supposed to be good for headaches. When customers come in and ask for a Dope I do not consider they are making a definite and specific request on me for Coca-Cola exclusively. Take Dr. Pepper's, that is the first I ever heard called Dope, and, oh, that has been about 5 years ago I was in Shreveport I heard it called Dope. I hardly ever hear Koke, I do not believe while I have had a fountain—first, let's see, about 3 or 4 years ago some stockmen came in here from Ft. Worth, you do not hear much Koke called for around here, but they would go and call for Koke, they were here with some stock at the stable. The word Dope as applied to a soda fountain beverage means any cola drink. I have had them come in and commence—"You make a good dope here, I don't like the Owl's dope, the Owl or Yellow Pine, the Owl's Dope, the Yellow Pine served good "Dope." I had a call from a representative of the Coca-Cola Company last summer, sometime or spring. There was a little fellow through here that used to come through

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about twice a year representing the Cola-Cola Company. There was a fellow last April or May came into the store, and said he was from Atlanta from Candler and Hirsch—Thompson, Candler & Hirsch, I believe it was who represented he was out of their office and represented the Coca-Cola people. He said he was an attorney. He told me his name, he introduced himself. That looks like the gentleman, Mr. Pierce, here, the chief detective for the Coca-Cola Company.

Mr. PIERCE.—We object to that, there is nothing in the record to show that I am a detective.

Objection overruled and appeal prayed and granted.

That is the gentleman. (Indicating Mr. Pierce.) I never saw him but once I seen him in the store there, it was about, let's see, April I think. [1313] I went over there in April the 1st. I may get the months wrong, I do not know but it was the month I moved after I went over there on the corner—it must have been April and the man came in there and said he represented the Coca-Cola Company, he was out of the—let me see, the attorneys, Thompson, Candler & Hirsch, I know it had the Candler in it because I remember the name Candler on account of the old man Candler and he said they had me dead-to-right, for substituting Coca-Cola and if I would sign a contract not to sell any other drink made by other people that I could escape prosecution and that it was a violation of the law and I was also liable to civil action for damages but if I would not do it and

(Deposition of C. J. Thornton.)

sign this contract and use Coca-Cola that there would be nothing more, that the Yellow Pine had agreed to do it, the Love Drug Company had agreed to sign it or had signed it and that Hays & Field was going to quit and everybody but N. F. Williams at the Owl Drug Store, and he said he got mighty raw, mighty raw. I told him I could not do that. I said I cannot see any difference in it and I said, ever since I have been in the business, or knew anything about it people called for a Dope, they wanted a cola drink and he says, "We claim the right for the word Dope and if they ask for Dope they want Coca-Cola and we want you to give them Coca-Cola." He said, "We have set aside, the Coca-Cola people," I think he said, "Three Million dollars," some big sum and he said, "the old man is making donations—I thought at the time and do yet that he meant old man Candler, owner of the Coca-Cola business, I was always told that he did own it, practically all of it—that they had two million dollars set aside to prosecute and put the other people out of business and they could do it. By other people I mean the people that sold Dope, Koke and went on and called over, and he said that they broke the Gay-Ola people, he guessed the Gay-Ola people, he said they are busted. He said, I do not think they are making any more now. I told him, I did not think their man had been around in 6 months, that I knew of and he said it is only a matter of time until you cannot get anything but Coca-Cola and he said that they put them out of business [1314] and he said we will do it with the others, we

(Deposition of C. J. Thornton.)

have got the money to do it. He said, if a man calls for a Dope, he said you know as well as you know you are sitting there that he wants Coca-Cola. I told him I always sold Coca-Cola when they asked for Coca-Cola. That if I did not have it I told them that I did not have it, and at that time I did not have Coca-Cola for a week or time, because I had applied to Crow, had sent down there to get some more and he said that he could not do it. I had gotten several gallons from him to serve when they asked for Coca-Cola. He said, I cannot let you have any more, you can buy a barrel or 10 gallons. I said, Mr. Crow, I do not want to buy a \$72.00 barrel and if I get less than that I do not want it as I cannot use enough of it and get the discount off, so as to bring it down to anything like the other costs. And I said, I really like the other drink better and I have several customers that prefer it and I thought when I run out I would send down and get some from some of the other drug stores until they would not let me have any. They told me they could not let me have any more and that was after a young Coca-Cola man was in here, a little fellow and a mighty nice little fellow. It seemed that he was going to place on their doors or wanted the men, the clerks to tell him what they had sold in a certain time of *pure* Pure Coca-Cola. He said he was going to fix up these and if they would quit the others and sell his stuff he would make it nice. He never tried to force me, that other fellow did not, to do anything. As a result of this conversation, I refused to sign the contract. After my refusal to

(Deposition of C. J. Thornton.)

sign the contract he said, " You are very frank about it." He said, "I will say this much, you acted nicer about it than Williams" and he said Williams got mad. I said, "I won't get mad because you people can put me out of business if you want to because you have the money to do it with, and I said, "You cannot make me sell something that I know people do not want. I have got lots of customers that if I have got the straight Coca-Cola in there and they come in and ask for a Dope, they won't like it and because of another thing it will take more of your syrup to make a drink, it is not thick [1315] and heavy like it used to be and it takes more of it to make a good drink than it used to take." He said, "Well, will you write what you stated to me—will you write out that and address me at the hotel?" I said, "No, I won't do that." He said, "What are you going to do?" I said, "I am going to keep on selling as I have been selling." He said, "I am sorry but we will have to fulfill our promise." He said, "You will have a suit brought against you in a short time." I told him I suppose I would get out of it in some way and if I did not they could take the place. When this Coca-Cola representative came to me and charged me with substituting I had not been substituting. If I ever substituted it was at sometime when I was selling something else besides the Dope made in New Orleans. I told him I thought I would be substituting if a man came in and called for a Dope and I gave him Coca-Cola, but he said we claim that name Dope because we were the originators of the Coca-Cola drink and people ask for Coca-

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Cola by the name of Dope before they ever heard of Dope. And I told him I was told by the representative of the Koke Company that Dope was a registered trademark and Koke was a registered trademark. "Well," he said, "they may tell you that, but," he said, "it is not so." The Coca-Cola company carried out their threat and brought suit against me. They brought suit against the Corner Drug Store. I will produce and file as an exhibit to my testimony, a certified copy of the bill and answer in that case, the suit they brought against me.

Cross-examination.

In 1911 the Corner Drug Company was supposed to be incorporated, a corporation. I owned stock in it. I borrowed the money from my mother in law, Mrs. George A. Mason. I do not know who it was that incorporated it. I can produce the charter. I will file a copy of it. I think the corporation was perfected. I was told by the attorney Bob Hale. I do not know whether they ever issued stock or not. I do not remember now. I do not know whether there was ever a stockholders' meeting. I owned all of the stock. This suit was brought against the Corner Drug Store. Mr. Hannah made answer to it. I do not know whose names were [1316] placed upon the answer. I think he told me theirs would have to be there, he said their names would have to be there as owners, because the suit was brought against the Corner Drug Store and them as owners. As a matter of fact, they were not the owners of the business. I owned it, that is, through the corporation. I was the

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owner of the stock then. That corporation went through bankruptcy before I had any interest in it. The bid was made for the Corner Drug Store along with the petition in bankruptcy provided it never closed its doors and never quit business, it would pay dollar for dollar for the business as it stood. I bought the assets from the trustee in bankruptcy. With reference to the charter they said they would fix it up for me. I do not know; they got the fee, the attorney, whoever it was, I tell you I do not know who the attorney was. They said they would attend to it and fix it up. I know Mr. Haney promised to do it. He was temporary trustee, I think, is that what they call it, temporary trustee, and he did not tell me anything different from that, and I think Mr. Haney was appointed permanent trustee, maybe, if they had one, because the referee came over and sold it. He sold it before the 15 days, I believe. I always told them it was a corporation, told them it was nobody's business who owned it. I did not deny that I had any pecuniary interest in it personally. The sheriff came to me with some executions and threatened to levy on the business. I did not tell him that I owned nothing in there; I told him to go and get a bond before he got on. I said you go and get an indemnity bond before you get on this drug-store. I did that to keep him off of it, because I did not want to close it up for what I owed. I told them every time I had a chance that it was a corporation. They never asked me who owned the stock in it. I did not testify in Judge Fairley's court that I did not have any interest in it.

(Deposition of C. J. Thornton.)

There never was any attempt to seize that property except one time when the fellow said something about getting on it, and I told him to get a bond. I have been in the drug business in Hattiesburg since about 1911. I used to drink a heap of these various beverages prior to that time. I have heard Dope [1317] ever since I have heard of dope, about 18 years ago, I asked for Dope and got a drink of Dr. Pepper's. I do not know the names of them; I would not know the names of the different syrups and things like that. The first time, 18 years ago, was Dr. Pepper, was the first I ever called Dope. I do not think Dr. Pepper's is a cola drink. Eighteen years ago I was in Vicksburg, right along there was Coca-Cola. Fifteen years ago they asked for Dope and they got it in a little keg in Vicksburg. They got something in a keg and mixed it, a small keg, and they called that Dope. I do not know what it was. I do not even know that Coca-Cola was on the market 18 years ago or not. The last cola beverage I handled in my fountain at the Corner Drug Store before I went out of business was Coca-Cola. At Dallas, Texas, I did not have anything but Coca-Cola. I have been handling Coca-Cola exclusively, I reckon, about 2 weeks. Prior to that I handled Dope; the product of the Southern Koke Company, Limited, of New Orleans. I handled that about a year. I handled Coca-Cola during that time. I have been out of Coca-Cola, I reckon, during that time, but sometimes, as much as one time I was out about three days and I got a keg out of Meridian. Prior to this product

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Dope I handled Luck-Ola. I would have a barrel of Konut, a barrel of Luck-Ola, I have got a barrel of Tru-Cola, some time; I think Hagan & Dodd made that. I do not remember how many barrels of Tru-Cola I got. I thought I got it from Hagan & Dodd here, but I am not sure. Hagan & Dodd handle Konut. I had Afri-Cola when I first went in down there in October, 1911. They had some Afri-Cola there; it was a syrup-like extract; it had syrup in it, heavy stuff; I had to make it up. All that time we were handling Coco-Cola, too. We kept these different drinks in different parts of the fountain; we changed it around at different places; we had one here, over to the left, on account of the pump getting out of fix. I knew where the various drinks were kept in the fountain most all the time. I could not tell you to save my life the number of containers in our fountain. There are containers—this is the center, that is the draft arm right there; there is, I think that goes out this way, but I do not know [1318] if any go out that way the other side. I do not know how many is there, but we will put—I will put down twelve, but I do not know how many is on it; this is towards the door when you go in. We will make this draft arm #1—or “A” rather first container to your right mark “B”; in that was Orange. “C,” just prior to the time I went out of business Coca-Cola; Coca-Cola was in “D” when I quit. “E” was busted; I do not think there was anything in that. “F” was supposed to be pineapple. “G,” I believe, was busted. I do not think there was any more con-

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tainers on that, there was nothing up that way at that time. We will go to the left, "H" was Lemon. "I" was Root beer, "J" was strawberry, "K," I think, was busted. "L" was plain syrup, I believe—no, I believe the plain syrup was here. "K" was busted, I think the rest are busted, nothing at all except orange, lemon, strawberry and pineapple; that was prior to January, 1915. Up until the 1st of January, I had Coco-Cola in "C," and I had Dope in "D." "E"—let me see. The first is orange. The third one here we always kept Coca-Cola in very nearly all the time; if it run out you understand only now at times, we will say there was Coca-Cola in "C" and if we run out of Dope we would put Coca-Cola in this one. We would have two Coca-Colas there if we run out of the other, because in drawing out it will happen nine times out of ten if your syrup runs out as it does when a crowd is at the fountain. If we run out of one, we put the other in that container. We would put the other in that container. That is the container C and D. I had Coca-Cola in there twice. That was no stable arrangement; if I would run out of Dope, I would have Coca-Cola in these two or run over there into the second and third. I could not tell how long this arrangement was, because we used to keep Coca-Cola here away back here somewhere, when we had a full line of drinks. We put it in there ever since we have been in business, the first has been used as orange, the second, third and fourth have been used for Dope and Coca-Cola. At different times we would have different things in each one.

(Deposition of C. J. Thornton.)

Part of the time "C" was labeled something, part of the time it was not labeled. Sometimes "C" was plain label that I had turned over, and sometimes it had Coca-Cola on it; I did not have a Dope label; there was [1319] two Coca-Cola labels, one was turned over, sometimes, it was on "D" and sometimes it was on "C." I can explain that to you now. If you run out—say if you have Dope and Coca-Cola and you run out of Dope, you fill up this one with Coca-Cola. You have two Coca-Cola's there, we will say, the barrel of Dope comes in, this one over here that has Coca-Cola in it, it runs out. We draw a gallon of Dope and put in there and push the plunger down in the drink and then they would have to put the plain one over there. If we had Coca-Cola in both, or if we had Dope in both, we will say we have Coca-Cola in the two. We would take out, as you run out of this, the plain one out and set it over here. It was always labeled Coca-Cola. That was my instructions, I have done it myself time and time again. I could not say whether it was done, that was my instructions to the men, to everyone there, we had a plain and a Coca-Cola. The plain one was for Dope. My instructions were to change the pumps, I know when I moved them. The change would not be very often, I do not suppose they run out more than two or three times a year, that there would be a necessity for any change. I always had sufficient Coca-Cola on hand for the people that called for it. I hardly ever run out because I could get it from Mr. Crow and I could get it from the Century Drug Store

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and from the Owl Drug Store any time I wanted it until a man came around and said I would be unable to obtain it except by barrels, that is the Coca-Cola representative. I do not know his name, he was a very nice fellow. I could not tell how much Coca-Cola I did buy in 1914. I did not keep any books, I could not tell you how much Dope I did buy. I can get that from the Dope people, the different people, I can get it. I can get it from the Koke people and can get it from the Luck-Ola and Tru-Cola people. I got several gallons of Coca-Cola from the Century Drug Company, I got several gallons from the Owl Drug Store in 1914. That was here, Hattiesburg, Mississippi. I got several gallons from the Coca-Cola Company in 1914—wait a minute—I believe Mr. Crow had quit selling me and when I went over he would not let me have any. I bought from Mr. Crow in 1913. I could not tell you how much, I bought it from him regularly. I think the most I ever got from him was 5 gallons at a time. I got it in a demijohn. [1320] I would generally use a 5-gallon demijohn of it and after I used 5 gallons of it, and I would use 5 gallons of Dope and I have used as many as two barrels of Dope to five gallons of Coca-Cola because—I have kept count of it at one time there, awhile, there would be about 20 to 25 calls for Dope and one call for Coca-Cola. I started this business with the Corner Drug Store in 1911. It was in business before but I was not connected with it. The product Dope from New Orleans comes to me in barrels, 50 gallon barrels. I do not know how

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it was labeled, I never paid any attention to the labels. I do not know whether it was labeled or not. I said approximately 90 per cent of our customers called for Dope and in response to those calls I would serve him Luck-Ola, Tru-Cola, Dope and Coca-Cola. I have served lots of that. When a customer asked me for a Coca-Cola during the times that I was out of Coca-Cola I told him I did not have it. That was the instructions I told them, and told them because I was always looking for a pimp to come around. When they asked for a Coca-Cola I told them I did not have Coca-Cola. I always told them that. It has always been customary anywhere, when you asked for a Dope, you got a cola drink. If they came in and ask for Dope and I did not have Dope made by the Southern Koke Company I would give Coca-Cola. Customers using the term Dope or Koke, anybody knows they wanted a cola drink. Because I had good common sense, and a man with one-third or half sense would know that, when a man asks for a Dope if he has sense enough he knows he wants a cola drink. If they wanted a particular drink they would ask for it. Whenever a man come in and was particular enough to ask for a Coca-Cola we were always particular enough to give what he asked for. When a party comes in and asks for a Dope they want a cola drink, that is what I know. I know from being around the soda-fountain, putting it out, and I know if they come in and ask for a Dope and I give them a lemon soda they would throw it in my face, the particular ones, and the ones that want

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Coca-Cola ask for it. How would I know that they wanted a Coca-Cola drink when they asked for a Dope. How do I know they want a Coca-Cola when they ask for Coca-Cola, I give them all credit for having sense enough to know what they want. I think when he asks for a Dope that he wants a cola drink, I never go into the details. There are a few people in town, regular customers who [1321] walk in and say, "I want a Coca-Cola," you can pretty nearly always tell when they want a Coca-Cola. That is so. At one time the Coca-Cola people come in here with some pimps, and got around on the street kinder circulating around, you know, about poison, that some of the drug-stores here were selling stuff that was poison for Coca-Cola and they went so far as to advertise, the Coca-Cola Company has, on the different places, to ask for Coca-Cola by name, and that went along so when the street-car boys, I noticed would come in and ask for Coca-Cola. They would ask for Coca-Cola, they got it, people that had been asking for Dope got it, asked for Coca-Cola. They run it up here one week where we would use usually a gallon of Coca-Cola every other day, where we had been using a gallon a week sometimes. The Coca-Cola people advertise, ask for it in its own name. They do that they said to avoid substitutes. It went pretty hard and we had to pay a dollar and a half a gallon for that when they said ask for it by name to avoid substitution, for a man to ask for it. I do not remember they said not to use nicknames. I think they had one on at the picture show

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down there. Coca-Cola costs a dollar and a half, Koke a dollar a gallon. I handled them because it was better, is a better stuff and gives better satisfaction. There was more profit in it. We got the same price over the fountain. I handled the Dope because I like it better and because it gives better satisfaction than Coca-Cola at a less cost. I said I liked it better than Coca-Cola, it gives satisfaction. I base my better satisfaction when you take it up and drink the whole thing down and say, it is a good drink. I do not suppose any customers knew what they were getting. I have given Coca-Cola and they said it was not as good. Lots of those customers knew when they asked for Dope whether they were getting Coca-Cola or not. I told some of them what they got. It was the best cola drink I ever sold, I had more comments on it, was Luck-Ola, I had more comments about this is good Dope. I could not name anybody particular customers that knew, because when I was handling Luck-Ola as a Dope I had a contract with the Luck-Ola people for Mississippi, Louisiana and Texas, and it was generally known what ones—for drug-stores have a bunch of regular customers, you might say loafers who stay around and they all knew I sold Luck-Ola. There was one, G. Bufkin, he wanted to sell it, he came in one day and he drank it and he said, this is the best Dope I ever drank. He said, what is it? I said [1322] Luck-Ola. I expect that was in 1912 or 1913. There were several of them and I just remember him because when he drank it he wanted to sell it, and another fellow, Groff,

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and the young fellow by the name of Bridges used to work in a drug-store. I asked him to sell it and they did sell it and recommended it. I was not in attendance always at my fountain. I worked in reaching distance all the time. I was there 4 years, I think 4 years in there, 1911. I stayed there pretty close. My dispensers could have at various times sold some of these other products, Dope, Koke, and Konut, and other things for Coca-Cola by acting against instructions. My instructions were to sell Coca-Cola if they ask for it. That was all of my instructions relative to Dope and Coca-Cola. I told them time and again since this talk you know, I do not know whether they had brought suit against people, they were always talking about it, about substituting, etc., and I instructed them if people asked for Coca-Cola to give them Coca-Cola, and if they asked for Dope you can give them anything you have because when you ask for Dope that means a cola drink. If you want to go to assumptions, I just assumed if they wanted Coca-Cola they would ask for it; if they called for Dope they wanted a cola drink. The Coca-Cola people have always been threatening ever since I have been in the drug business, I have had a soda-fountain, take the Coca-Cola people, they would come around a soda-fountain and if—after they began to roll people around for substituting they would tell you if you were substituting, they would tell you you were substituting when they came in and ask for Koke, when a man comes in to you and asks for a Dope they want Coca-Cola, we claim that

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word, we know what they want. I instruct the dispensers if they call for Coca-Cola to give Coca-Cola and if they call for Dope give anything they had. I give that instructions because I did not want to be prosecuted and put out of business. I have always been threatened with suits. If a man asks for Coca-Cola it is against the law to sell him anything else. I could serve the customer with a glass of these other drinks and as a general proposition he would not be able to tell, they all taste practically the same and all look the same. I expect there would be some people who would be able to tell the difference. If it has been done it has been done against my instructions. The last representative of the Coca-Cola Company that called [1323] (Mr. H. B. Pierce was examining the witness at this point) was here either April or May, I was trying to get it, it was a little thin fellow, it was a short fellow that would weigh about 140 pounds, he was here in April. He was here before, went through and come back through several times. I do not know the name, the fellow introduced himself, but I cannot remember the name at all, I am satisfied it is not you. He had about 3 fellows with him, there was 3 come in and there at one time and asked for Coca-Cola and I laughed at them and they went out, along in April, I believe. I moved over there the first of April and I know we had been there almost a month when that fellow came in, it was in the morning. I certainly did not make a statement at that time and admit to Mr. Peace that it was true that I was substituting other

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drinks for and as Coca-Cola. I told him I did not have to lie. I did not say that I was now doing no more selling of imitations for Coca-Cola, not a word of truth in it, nor did I further state to him that I had bought no Coca-Cola syrup for over a year. He asked me what I handled outside of Coca-Cola. I had bought a 50-gallon barrel of the product of the Southern Koke Company. I did not say that I was using about 2 barrels of it a month during the summer, not that much. I stated to Mr. Peace that if the Coca-Cola Company wanted to they could proceed against me in any manner they wanted to. On March 30, 1913, and November 3, 1913, I was in charge of the Corner Drug Store. On that date I never drew syrup from the same container in our fountain in response to calls for Coca-Cola, Dope and Koke. If it was done I do not remember. I would be surprised to know it could be done. Oh, yes, because they are close together, those nicknames could have happened. I do not know as they may have happened. The same condition could be true from the time I started until the time I quit, that would cover all of it. It could not be even possible for you to draw that, a man with a bunch up in front, it is possible that a man would ask for one, one say, give me a Dope, another Coca-Cola and another Koke. Mr. Peace did not come to me and directly state to me and show me all his records where there had been sold in our store at various and divers times a product other than Coca-Cola when Coca-Cola was distinctly asked for. He did not state to me at the time

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that if I did not stop selling these other products as and for Coca-Cola when [1324] Coca-Cola was asked for that suits would possibly be brought against me. He came in there and he says that "You are selling a substitute for Coca-Cola. Now, we have got you dead-to-right. Unless you quit it and sign this contract to handle nothing but Coca-Cola made by the Atlanta people,"—and he had the contract there, and I looked over it once—you have seen that contract, like the rest of them—all but Mr. Williams,—he said, "We are going to bring action against you," and he said, "It could be criminal as well as a civil action." I said, "You are wrong." I said, "I have always sold Coca-Cola when Coca-Cola was asked for, and that is the general instructions. You can go in there and try to fool them." "Well," he said, "We got them the other day," and he says, "You served me Dope when I asked for a Coca-Cola." I said, "No, I did not serve you a dope when you asked for a Coca-Cola." He said, "Well, it come out of the dope container." I says, "The fact of it is I had Coca-Cola in both containers because I was out of Dope. You can go back there and see." I said, "I know who came in here with you. I remember the time because when you asked I invariably give Dope when they ask for Dope and Coca-Cola when they ask for Coca-Cola, but if we have not got the dope and they ask for Dope or Koke we give them Coca-Cola." And I said, "there it was in both pumps." "Well," he says, "You are going to have to quit handling it, anything but Coca-Cola. We are

(Deposition of C. J. Thornton.)

going to make you do it.” He said, “We have got the money to do it and” he said, “You know money will do it.” I said, “Money won’t make me do anything.” I said, “I expect to handle this stuff, the other, just as long as I can buy it for a dollar a gallon and it gives entire satisfaction.” I said, “I do not propose to pull up when your stuff is not a bit better, under the conditions they are I do not propose to help build up a fund to buy a rope to hang me with.” He said, “You had better do it.” He said, “We will bring action against you. We are going to do it. We have got the dope on you all right.” I said, “You may have but if it has ever been sold out there as a substitute I know it is wrong,” and, I said, “It is not the instructions.” And I said, “Possibly you may have come in here at one time and might have got Dope when you asked for Coca-Cola.” I said, “You might have done it and,” I said, “You cannot catch them boys in there, but they may have happened to make a mistake when a crowd is there, but my instructions are to sell Coca-Cola when Coca-Cola is asked for and when dope is asked for to sell a cola drink.” [1325] He did not show me any data or records of times when he had purchased samples at my fountain; he never showed me anything, just showed the contract. He never told me that samples had been purchased at our fountain as and for Coca-Cola, and that they had been analyzed and found not to be Coca-Cola. No records were shown me of that kind, he did show me a contract in his hand and he asked me, and said, “Well, you are

(Deposition of C. J. Thornton.)

pretty frank.” He said “Will you write just exactly what you have stated to me in a letter—write me a letter and address it to the hotel? We can get along.” He had a contract he wanted me to sign to quit and he said, “We have got you dead-to-right.” I do not know whether it was printed. I read it, the whole substance of it was to handle Coca-Cola and not to handle any other similar cola drink. He wanted me to admit in there that I had been substituting. In a general way it was just to admit that I had been substituting other drinks for Coca-Cola, and that I would not handle any of these other cola drinks other than Coca-Cola made by the Atlanta people, and that if I would do that there would be no prosecution unless I did do that that I would be—first there would be a civil suit for damages, etc., and probably a criminal prosecution. That agreement contained I was not to handle any others, I am sure of that, that I was not to handle any other cola syrups but the Coca-Cola. The suit was brought against me by the Coca-Cola Company. I have heard there was a preliminary injunction rendered against me by the Court, I saw it in the paper, that is what the United States Marshal served, you mean, was that a preliminary injunction. (Preliminary injunction against the Corner Drug Store.) I have seen it before. That is a temporary injunction, that was changed some before I could sell anything, it was modified because I could not sell anything under the original injunction of the same color.

Mr. PIERCE.—That will be Exhibit #44 and we

(Deposition of C. J. Thornton.)

desire to introduce as Exhibit #45, a certified copy of the final decree in the case. We also tender this diagram of the fountain as Exhibit #46 to the testimony of Mr. Thornton.

The Southern Koke Company, Limited, employed counsel to defend this suit against the Corner Drug Store by the Coca-Cola people, Mr. Hannah was employed by them to defend that suit. [1326]

Redirect Examination.

This Dr. Pepper is a soda-fountain beverage. I mean by Coca-Cola pimps, people that try to catch you serving other than Coca-Cola when Coca-Cola is asked for, detectives, that they have all around shadowing the trade in that way. This Coca-Cola representative Pierce or Peace or whatever his name was when he came to me last April or May, he said Dope was poison. This Dope made by the Southern Koke Company, Limited, was poison, poisonous substitutes. This man Peace told me that he was out of the law firm of Thompson, Candler and Hirsch. This paper (Defendants' Exhibit 227) is substantially a copy of the contract which this Coca-Cola representative wanted me to sign, that is the whole substance of it, of the whole contract that he showed me, and wanted me to sign. This paper, marked Complainant's Exhibit #43, being a copy of the preliminary injunction issued in the case of Coca-Cola Company vs. J. T. Mason and Gergiaha Mason, doing business as Corner Drug Store, that injunction was presented without a hearing from the defendants' attorneys just on the allegations of the bill,

(Deposition of C. J. Thornton.)

that is, I was told that it was. This paper was served on me along with the summons. I did not have any notice of the suit being filed before this paper was served on me. This paper marked Complainant's Exhibit #45, purporting to be a final decree in that same case, neither I or the Corner Drug Store was present at the time the decree was taken or knew that the case was coming up for trial at that time, at the time that the decree was put down. There was none of them present, or knew anything about it outside of—that is unless Mr. Hannah was there, the attorney. I did not have any notice that the case was coming up for trial at that time. It was just a default decree that was taken. That was just a snap judgment taken down there without notice to me that the case was coming up for trial. This preliminary injunction marked Complainant's Exhibit #43 was modified so as to enable us to sell other drinks of the same color. The original injunction, as originally written would even prevent me from selling root beer, or sarsaparilla, from selling anything of identical or similar color. Sarsaparilla and root beer are of similar color and lots of things are similar color; creme soda is the same color. [1327]

Recross-examination.

That modified order was an agreed order, that is what Mr. Hannah told me. I never saw a copy of it. He said that the decree, he and Cook agreed to strike out the—in that injunction where it says similar, identical or any other beverage, I believe was

(Deposition of C. J. Thornton.)

the way it read, any other beverage with similar or identical or similar color, something to that effect.

Mr. COOK.—It will save time by introducing that copy, to show what the agreement was. We will offer in evidence the copy of the modified agreement. Opposing counsel offer no objection to the carbon copy, do they?

Mr. LITTLETON.—No, sir.

I did not go to the federal court on the day it convened in Buloxi, the last session. I was not present on the day this final decree was entered. I do not know who actually appeared, personally. I do not know what proceedings were actually had on the day this final decree was rendered. I was not there. I first learned that the final decree had been rendered right to-day. I did not see a notice of it in the newspaper, not the final decree, the newspaper stated that the injunction—I do not know the exact words, but anyway the substance of the newspaper report was that they granted an injunction and damages or something else. The question of damages being left open. I think it was to be left open for a future suit, provided the Coca-Cola Company cared to prosecute further. I saw the newspaper report the day after; that was about the third day of the federal court, I reckon.

Mr. LITTLETON.—Q. Mr. Thornton, you are contemplating are you not, not to take proceedings to have that default judgment satisfied?

A. Yes, sir.

(Deposition of C. J. Thornton.)

Mr. COOK—(Continuing). What action do you contemplate to take?

A. I leave that to the attorney, Mr. Hannah. Mr. Mayfield employed Mr. Hannah. Mr. Mayfield is manager, I suppose, or the owner of the Southern Koke Company, Limited, at New Orleans. He said that he would help us through on it. That is the time that he employed—he came down and I told him I had no money to fight the case. That was when the suit was first instituted. I have not conferred with him since that time in regard to the suit. I had my conference with reference to attempting to set aside the decree with Mr. Hannah, just met him on the street down there and he said I did not understand [1328] it; he said it cannot amount to anything because we have not had any notice and the only deposition, I believe he said the depositions of the Coca-Cola side have been taken, but we have not taken our depositions yet and we are not ready for trial and never had some agreement or notice of this, and I told him the other month,—I said, “What can we do?” He said, “We will have to have it reopened. I do not know whether the federal court is in session down there or not. I do not know that was what happened.” Someone called my attention to the Coca-Cola case and I got a paper and looked at it and saw how it was.

Redirect Examination.

You told me you would take the matter up with Messrs. Stephens & Cook about having the order set

(Deposition of C. J. Thornton.)

aside. I do not know what conversations you have had with them. Mr. Mayfield employed you (referring to Littleton) through me.

Recross-examination.

I guess I will have to pay the fee in the long run. I told him I would pay it. I am going to pay Mr. Mayfield. He advanced, he asked me when he came back, I do not know how much the fee was, he said when he came back in and talked to me and I told him to employ Mr. Hannah, and he went down there then and I went down there with him and when he come back, Mr. Mayfield, come back, just about dark, and he said, "You will have to start Mr. Hannah off to work by giving him a little check." I said, "I have not got it, Mr. Mayfield." "Well," he said, "I will send one to-morrow. I will send it to you and you can carry it to him," and he sent the check to me and I carried it to Mr. Hannah. I have not been out any money in the employment of Mr. Hannah. I have made, you might say, temporary arrangements, to go to work for Mr. Mayfield and pay him what I owe him. I do not know how much I owe him. I told him, here about a week ago, that I did not have any money, but I would pay it as soon as I could. I said, "If you have any opening anywhere to go to work I will work it out." "Well," he says, "I have a place in Little Rock I can put you to work." I do not know how much I owe him. In addition to Mr. Hannah's I owe him for some Dope

(Deposition of C. J. Thornton.)

and I owe Mr. Hannah for whatever [1329] it is, I do not know what that is yet, he said he did not. I agreed to work it all out.

Deposition of A. S. Goody for Defendants.

A. S. GOODY.

Direct Examination.

Age, thirty-one. Live at Lucedale, Mississippi. I am the mayor of that town. Aside from being mayor I am engaged in a drug-store at Lucedale, Mississippi. The name of my drug-store is Lucedale Drug Company. I have a soda-fountain in my drug-store. I dispense Dope and Coca-Cola. This Dope is bought from New Orleans, the product of the Southern Koke Company, Limited. I consider the word Dope means anything in that line, of Coca-Cola or cola beverages, like Konut, Afri-Cola, Gay-Ola, any of those cola drinks, rather an indefinite term, it does not mean any specific one, no specific brand of cola drinks. I had a call on me by a representative of the Coca-Cola Company sometime in September, 1914. He came in the store and the first I knew of it, he came back in the office, but he came in the store and asked for Coca-Cola, and the soda dispenser gave it to him, and he tasted of it and told him, he said that is not Coca-Cola, and the young man told him it was, and he asked for the manager and he pointed me out to him, and he came back and asked me why we were selling a substitute for Coca-Cola. I told him we were not doing it. He said, "I just bought one, asked for Coca-Cola and

(Deposition of A. S. Goody.)

he did not give it to me." I called the soda dispenser back and asked him and he said that he did. That was our instructions to him that he should serve Coca-Cola. We keep the two syrups in there, in separate jars. One has Coca-Cola and the other has banana on it, on the label. He said, "I served him the drink out of the jar labeled Coca-Cola." My nephew was visiting me at the time and he pointed out, standing before the soda-fountain at the time, just pointed to me and told me the motion that this was served out of the jar labeled Coca-Cola, and the traveling man pointed out and told me that he got it out of that jar and it was the one that we keep Coca-Cola in. And he then asked if I did not think it was unjust and unfair for us to sell it. I told him no. He asked me then if I did not know when a man called for a Dope that he meant Coca-Cola. I told him I did not, that I was not any mind-reader, and I did not have any [1330] better sense than to give a man what he called for. I could not tell you exactly the words we used, but we had quite an interview, and the substance of his contention was that we ought to sell Coca-Cola no matter what they asked for, and I told him I thought if he asked for Dope I had a right to serve him Dope, and if he asked for Coca-Cola I always served Coca-Cola, just like they ask for, and he then told us, did not tell us right out, but he intimated, or rather, indicated to me that they were going to enter suit against us if we did not quit handling this other beverage. He

(Deposition of A. S. Goody.)

wanted us to handle Coca-Cola exclusively, serve it on all calls. He did not offer to sell anything or ask to sign any contract or anything, in fact his manner was very peremptory all the way through the whole conversation in discussing it, and the question came up as to the quality of the two, and I told that I had served my customers with these drinks set side by side, that is, Coca-Cola and Koke, and asked them to taste them and see what the difference was between the products, and they all preferred Koke if anyone had any expressed preference for Coca-Cola. I think it is a better drink. I use the two and the other weighs a pound more to the gallon and I do not see anything wrong with it. He said, "It is not a better preparation." I said, "My customers like it better." He said they did not do that. I said, "If you go to disputing my word, that ends it. I am not going to dispute with anybody; this is my place of business and you get out," and he started out and turned around and came back and told me, "Don't you dare to sell any other—another drink of that stuff on calls for Coca-Cola." I told him that was gratuitous because I am not doing that anyway. I never have and I am not starting it this late in my life. That ended the interview. I do not know that I told you all that happened but that is about the substance of the interview and that is about the only time they ever called on us in that kind of a way. The Coca-Cola syrup is not always uniform. I could not tell you the difference exactly

(Deposition of A. S. Goody.)

but some barrels seem to be a thinner syrup than others. Possibly a lighter color and it has a little variation in taste and sometimes the latter part of it, that is, when you buy a barrel and use it, that the part that is used last will taste different from that that you [1331] first drew out. And that when you drew out first is odored or something like sassafras, and I have on one occasion that I knew of, that I drew out a small bottle of this, I think a half-pint bottle of it, and kept it excluded from the light and when we got to the bottom I compared the two and there was a difference in taste, not very much difference. I suppose that it is some oil or ingredient in it that exposure to the light will change. The thickness or weight of the syrup varies, that is what is known as specific gravity of it. I never had to send any Coca-Cola back to the Coca-Cola Company. I did not send it back, but about the time we started using this Dope I got a barrel of Coca-Cola. I think it was the worst barrel I ever had from the company. We had two come and it was brown, lighter than the other. I wrote the Coca-Cola Company about it and told them, I thought there was a mistake about it it was not satisfactory, and they wrote back and asked for a sample, and I sent some, and they wrote in reply that they had examined it, tested it, and it was like they had sold since they had been in business and it was all right and they refused to make any adjustment whatever. After this call from the Coca-Cola representative I wrote

(Deposition of A. S. Goody.)

a letter to the Southern Koke Company, Limited, with reference to the matter. Defendants' Exhibit #228 is the letter I wrote to the Southern Koke Company right after that occurrence.

Mr. LITTLETON.—You can ask him. I now tender and offer in evidence Defendants' Exhibit #228, being a letter from the Lucedale Drug Company addressed to the Southern Koke Company, New Orleans, as evidence on behalf of the defendants in the above-styled causes.

Cross-examination.

I have been in the drug business about ten years. I have been handling the product of the Southern Koke Company, Limited, about two years. I handled prior to that time Coca-Cola exclusively. I had calls at my fountain prior to the time that I handled the product of the Southern Koke Company for Dope or Koke. Just a minute; I did handle one barrel in my experience of Gay-Ola, that is within the other eight years prior to this last two. That was not named Dope. With the exception of that one barrel I handled Coca-Cola exclusively. I give Coca-Cola on calls for Dope and Koke. I did not [1332] understand it. I do not know how I understood it. I did not pay particular attention to it. I just knew they wanted something that satisfied them and answered for it all right, and there was no objection raised. It was the only kind I had. When did you first change your mind about that?

Mr. LITTLETON.—We object to that kind of question.

(Deposition of A. S. Goody.)

Object overruled and appeal prayed and granted.

I have not exactly changed my mind about it. I put in this product called Dope by the Southern Koke Company, Limited, about two years ago. I do not know the exact date. This product cost me one dollar twenty-five a gallon, with a twenty-five cents a gallon rebate if you pay it within thirty days. Coca-Cola cost one dollar fifty, a rebate of five per cent, I believe, if you buy one hundred gallons and more for larger quantities. We have a Puffer soda fountain, that is porcelain jars. We keep one in one jar and one in another. Those jars are labeled. The jar that I keep the product of the Southern Koke Company I think is labeled Dope and Koke. The jar that I keep the Coca-Cola in is Coca-Cola. I am familiar with our fountain. The draft arm called "A," to the left the first container "B" is Coca-Cola, "C" is vanilla, "D" I do not remember, "E" is not used, "F" is Dope, "G" is lemon, "H" is orange, in "I"—the position of those, they are not in use all the year and I do not remember what they are. "B" is labeled Coca-Cola. I keep Dope in the container "F," and it is labeled Dope or Koke. I am not in charge of the fountain all the time. I cannot say what goes on there all the time. I do not know whether my dispensers at any time serve one drink for the other. I watch for that as well as I can and they tell me they do not do that and they are given positive instructions to serve what is called for. My instructions in that connection is if

(Deposition of A. S. Goody.)

a man comes in and calls for Dope, give Dope; and if he comes and calls for Coca-Cola, give Coca-Cola. I do not know anything about what he wants. I give him what he asks for. I give him the one made by the Southern Koke Company, that is the cheaper product of the two. I make more profit on it, it costs us less money. It is not why I do it. I do it because it is what they ask for. I do not know what they want. I give them what they ask for. I do it. I just want to make it [1333] clear to you that I would do that if that were the higher priced product. I will say this, that I have some customers who tell me that they want Coca-Cola, and in fact I can name two, Mr. Boling and Mr. Johnson. They frequently call for a Dope and we always give them Coca-Cola. The dispensers know them and know what they want and always give Coca-Cola. When customers ask for Koke I give them Dope, sometimes I might get it mixed up and give Coca-Cola. Dope and Koke, the Southern Koke Company claim in their letters and advertising, they state that the two products are the same. One product with two names is the impression I have. I do not know about that. When a man comes in and asks for a Koke I give the product of the Southern Koke Company. I suppose when they ask for Dope I give Dope, and when they ask for Coca-Cola I give Coca-Cola, and when they ask a usual thing I think we give Dope. Prior to handling the product of the Southern Koke Company, about two years, with the exception of one

(Deposition of A. S. Goody.)

barrel of Gay-Ola eight years prior to that, people who asked for Dope and Koke at our fountain were served Coca-Cola. I do not know what the people want when they ask for Dope or Koke. I serve the product of the Southern Koke Company. That is cheaper than Coca-Cola.

Redirect Examination.

Well, when I started handling it,—I will make a full statement to make my position clear on it,—I have no interest whatever in either one of the companies. I do not care any more for one than for the other. I do not know any of them, and have no interest in any, but a good many of my customers would come in and ask for Dope, and talking over the matter about the advertising, the wide advertising, and things of that kind, they would say, “Why don’t you handle Konut, and get some Dope?” I got some of it in Mobile—in Hattiesburg, and I like it better than I do Coca-Cola. I never did pay any particular attention to it until Mr. Patton, I think was the man, that came around and got me to put in a barrel to try it, and explained to us that we would sell it without violating any law on calls for Dope. I got some of it, sent to us on trial, subject to our approval. I think the terms that it is sold on—I would not swear, though, but it came in that way. When it first came in I explained that one was made in New Orleans, one in Atlanta, two different concerns, and supposed to be different products altogether, [1334] and asked them which they liked

(Deposition of A. S. Goody.)

best, at the expense of the store I would make up the two drinks, and nearly all of them preferred the Dope to the Coca-Cola. I always made it a rule to get that matter fairly. I will state we buy the Coca-Cola from the Central Drug Store in Lucedale because we do not handle enough to justify us in buying in barrel lots, and I made an agreement to buy from them and save us from having to carry two full barrels in stock at the same time. It sometimes happened that we would get out of Coca-Cola entirely and I always instructed the dispensers to instruct the customer, tell the customer we have not got Coca-Cola. This traveling man came in and asked for Coca-Cola. I told him I did not have it. He said, "Well, have you got Dope?" I said, "Yes." He then remarked that "You are an honest man." When a customer comes into my fountain and asks for Dope or Koke, and I serve him this New Orleans product, I consider I am giving him what he asked for. I never had a customer refuse or decline a Koke or Dope, the New Orleans product, on the ground it was not what he asked for as Koke or Dope.

Recross-examination.

I do not remember the name of the Coca-Cola representative that called on me. He does not call on me regularly. It was August or September, 1914. When Mr. Patton of the Southern Koke Company called on me at the time I first took up the question of purchasing the product of the Southern Koke Company, there was no comparison made at that

(Deposition of A. S. Goody.)

time between his product and Coca-Cola. Nothing was said about Coca-Cola at all at that time. He simply told me that he had a drink, that he had a drink that was selling under the name of Dope and Koke, and he said you have calls for it, and I told him what I had been serving there and he said he thought we ought to sell this other—well, their other produce on those calls. I do not remember the reason, that happened a good while ago. I simply made up a drink from Coca-Cola syrup and another drink from Dope syrup and gave the two out and asked the customer which he liked the best. I did not tell the customer which it was until after he had made the test. The customer was not in any position to know what he was drinking. I done this, in making these comparisons when they come in and called for a drink, and I have just simply for my own [1335] benefit, as I wanted to find out which was the better of the two, to see whether he could tell any difference between the two. As a rule, they could tell, they generally expressed the preference as to which they liked. Not always would they say the product of the Southern Koke Company, but usually. When people come into our fountain and ask for Dope and I serve the product of the Southern Koke Company, the soda-fountain is right open and they can see where I get it, they can see what it is labeled. They would have no means of knowing except my word and reputation of the firm. I do not tell my regular customers what they were getting, they all know we

(Deposition of A. S. Goody.)

are handling the two products. Well, I mentioned two, P. P. Bailey, C. D. Johnson, C. D. Hinson, T. T. Tyree, M. M. Griffin, H. Dickens, M. M. Hammon, G. S. Dickens, W. J. Smith; is that enough, I could get you a list. I just give you the ones right around there. Some of those I have given you are some I know prefer Coca-Cola and some prefer Dope, and always come in and insist on having Dope. All of them know it, practically, and I think everyone of them know we are handling two products and that they have to ask for one or the other, whichever one they want. They clearly understand that we have two products made by two different concerns and will get what they ask for.

Deposition of J. E. Jones, for Defendants.

J. E. JONES.

Direct Examination.

My age is forty; engaged in retail drug-business here at Hattiesburg, Mississippi. The name of my drug-store is the Yellow Pine Pharmacy. I have a soda-fountain in connection with my store, have had a soda-fountain nine years. I have dispensed Coca-Cola made by the Coca-Cola Company, and Konut by Hagan & Dodd and made in Atlanta. When customers came in and asked for these cola products, the average run of customers ask for Dope or Koke, Dope usually. I served Konut when I handled it. I have handled it not quite two years. When customers came in and asked for a Dope and I served them with a Konut I considered that I gave

(Deposition of J. E. Jones.)

them what they asked for at that time. Of course, I think it was within my rights in handling Konut. I cannot remember that we ever had a customer to refuse Konut when served to him on requests for Dope or Koke. It seems that I would have known it, not being my [1336] own dispenser, unless it came back to me but I never know of it. I am not about the fountain myself so very much. Some time ago I had a call from a representative of the Coca-Cola Company with reference to my handling this product Konut. I had a call from him, I had quite a few conversations with a Mr. Watson about my selling it. I believe Mr. Watson is his name. He used to be salesman through this territory. I had another conversation with a representative of the Coca-Cola Company, a Mr. Pierce, this Mr. Pierce sitting over here. Mr. Pierce came and told me that I was substituting and infringing on their rights and I would have to stop it. He told me that he was Mr. Pierce, represented the legal department of the Coca-Cola Company. He told me that I would have to quit selling Konut, that they would sue me if I did not stop it. The Coca-Cola Company would sue me. A contract was presented to me to be signed. I do not remember that I have a copy of the contract. I do not know that it was a contract, I have one of their regular contracts, I signed one of those, that is a customer's contract. I signed that with the jobber. I do not know whether I signed it with the jobber later or give it to Mr. Pierce. I do not remember, I expect I must have given it to the

(Deposition of J. E. Jones.)

jobber. This contract Mr. Pierce wanted me to sign, was just an agreement not to sell—but practically an acknowledgment that we had been selling Konut, and would discontinue selling and sell Coca-Cola altogether, that we would handle Coca-Cola exclusively thereafter. That was my understanding. I told him I would consult my attorneys, I did that at his suggestion too, and just to get myself on safe ground on the subject and would consult with my attorney. I consulted with Mr. Cook there and his partner Mr. Stevens, Mr. Cook here, present, they were not representing the Coca-Cola, however, at that time. I consulted them. I do not know whether Mr. Pierce knew them at that time or not. I went there and saw them. I actually quit handling Konut altogether. I am now handling Coca-Cola exclusively. I quit handling Konut because Mr.—My attorneys advised me to quit it, that I would get in trouble if I did not quit handling it. I do not know that they went into any law in the matter, that I could clearly understand it, they took the matter under advisement, [1337] I was there in the forenoon and again in the afternoon, or it might have been the next day, I cannot remember now, right now, when finally they told me it—it may have been a day or two later, or that evening, it seems they did not tell me right away, they looked into the matter and told me I was on safe ground to quit it. I quit handling Konut because of those threats and the advice I had on the subject, of course. I felt at the time that I was handling

(Deposition of J. E. Jones.)

Konut that I was clearly in my rights. I did not think anything else. My attorneys just advised me that the question of substitution had not been exactly settled and it would be a safe proposition not to question the thing, not be lead into all kinds of litigation on the subject you know, that would not have been profitable for a small man like me to have been litigating with a big concern over such a proposition as that.

Cross-examination.

At that time that Koke and Dope and those terms were probably nicknames for Coca-Cola was the contention of Mr. Pierce at that time. Now, Mr. Cook, I do not know that I ever had that advice from you as an attorney, that that was exactly the facts of the case. You advised me, and understand I accepted it, I employed you and your advice was taken in the matter. You concluded that it amounted to a substitution even though my intention was perfectly good at the outset. I was advised by the attorneys that was their viewpoint of the contention exactly, that I was substituting. I had Coca-Cola at that time for sale. I had never been substituting Konut when people came in and called for Coca-Cola. It has never been done with my knowledge, and is positively against my instructions to do such a thing. If any of my dispensers did so, it was against my instructions for them to sell Konut if a man asked for Coca-Cola absolutely. A Coca-Cola representative wanted to go back to the

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back of my store and examine my barrels and containers, he was a right young chap, seemed to be of age, I think his name was Jackson. Mr. Watson peeped in my back window according to his own statement. Mr. Watson said he was looking in at the back window, I think Mr. Watson said too that I had an empty Konut barrel on the sidewalk and he looked into the [1338] back window to see if I had any more. I quit handling Konut not because it is a substitution but because I wanted to avoid the threatened litigation. Of course I consulted my attorneys and they told me I was substituting and it would be safe to quit.

Recross-examination.

I have always instructed my dispensers relative to handling these drinks. I could not know whether my instructions were always carried out. I know it is like it is in various other instructions. Very often they are not carried out. It could have been possible that some of my dispensers at some time had sold some of this Konut for Coca-Cola. If it was done it was done positively against the instructions. I never knew of it to happen. I have been handling Konut, I think it had been pretty close to two years. I was in business nine years, prior to that time I handled Coca-Cola exclusively. When customers came to my fountain first prior to the time I handled Konut and made a request for a drink of Koke or Dope I serve them Coca-Cola. I never handled any other drink but Coca-Cola. At that time I understood they wanted that. Konut syrup costs a dollar

(Deposition of J. E. Jones.)

a gallon. Coca-Cola a dollar and a half. The difference in price is the reason I handled it. I could not remember how many barrels of Coca-Cola I purchased in 1913. I would have to go to get my files and tell you, I can do that mighty easy. I could not tell you how much Konut I bought in 1913 to save my soul. I can go to my books. I expect I have got that record in my books. I am sure I have my business in the ledger, both of them. I do not know that the terms Koke and Dope in Hattiesburg are nicknames for Coca-Cola. I cannot tell you yes or no. I have asked the public, some are positive and some say no, it is every man's personal opinion, it seems that is what I do not know. When a customer comes in and asks for a Dope or Koke I thought when I give him any cola drink I was in my rights. I did not know what the customer wanted in my mind. I just gave him the cola product I had, the cheaper product. Any man is in business for his profits:

Redirect Examination.

I have never considered when a customer came in and asked for a Dope or a Koke that he was making a definite and specific request on me for Coca-Cola [1339] exclusively at that time. Prior to the time I know of no other cola drink absolutely, other than Coca-Cola.

Deposition of J. R. Kelly, for Defendants.**Direct Examination.**

Age forty-five; live in Ellesville, Mississippi. I am a bookkeeper, secretary and treasurer and bookkeeper for the Hyde Drug Company. We have a soda-fountain in our drug-store. We dispense the Southern Koke Company's Limited, Koke, this Dope and Koke, and Coca-Cola. I have been engaged in the drug business there two years and six months. I very seldom wait on the counter. I do not suppose I wait on one customer a day. I had a call on me, I do not remember exactly when it was, it was last summer sometime. I believe his name was Pierce. I am not positive that he is the man (indicating Mr. Pierce.)

Mr. PIERCE.—It is not so long ago, you ought to remember.

He told me he represented the Coca-Cola people. Well, he came in there, he had a contract of some kind that he wanted us to sign. I am not sure whether he had talked to Mr. Hyde before this or not. My office is at the back. He came in there and showed me a contract he wanted me to sign, or the Hyde Drug Company to sign to sell nothing else but Coca-Cola. He showed it to me. I read it over and I asked him, I said, "What do you mean by this contract?" He said, "Just what it says." I said, "Do you mean that we are to sell nothing in the world but Coca-Cola, if we sign this contract." He said, "Yes, sir." I said, "I will not sign it," and there were some words passed. I do not remember

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just exactly what it was but I asked him to let me see my attorney in the matter, which he said was all right, and I went out, I reckon for thirty minutes, something like that and I saw my attorney and he [1340] said he would not sign it. I came back and he said, "What are you going to do about that." I said, "I was not going to sign it." I asked him if he would give me a copy of it and he said he would not. He said if I was not going to sign it I had no further use with it. That I would hear from him later through his attorneys. Before he showed me the contract he said we were liable to indictment, and he was going to have us indicted unless we signed the contract to stop selling this other stuff, as a substitute for Coca-Cola. I knew very little about the law. I knew we were buying and selling at the fountain because I was buying for it and knew we were handling both. Neither the Hyde Drug Company or any of its dispensers had been substituting as far as I know. I had instructed the boys not to do it. He just took the contract and got on out and said we would hear from him later. I had a call on me by the attorney for the Coca-Cola Company, one morning not very long after that Mr. Divers came into my office and presented the same petition, or the same contract rather to me, I said, "Judge" I had known him a long time, I said, "Judge, you do not mean for me to sign that thing, do you," and we just laughed it off that way. "Now, yes." I said, "Well, now I refused to sign that thing for the representative of the Coca-Cola

(Deposition of J. R. Kelly.)

Company and under the instructions of my attorney, Captain Hardy. Suppose we just walk around and see Captain Hardy and see what he says about that.” He said, “All right, we will do that.” So, we went around to Captain Hardy’s office and Captain Hardy said, “Divers, don’t you know that that contract is absolutely no good? In other words,” he said, “do you suppose I would let one of my clients sign that thing. Those people around do not sell a thing in the world only what their customers call for. I trade there all the time myself. If I want a dope I go there and get a dope. If I want a Coca-Cola I get it.” He said, “Who is signing this thing?” Divers said, “I believe every drug-store in the state has signed it except about five or six.” He said, “Divers, I will tell you what I will do. You tell me who those six are that have not signed it.” Well, he said that he mentioned that fellow down here at Hattiesburg, I believe it was Williams—I am not sure—he said, “Well, we had better stop. You give me a list of those that have signed it and if there is not over six in the state who have not [1341] signed it, we will sign it, and it was a question of fact a talk of an hour. Then Captain Hardy said, “Now, Divers, we positively will not sign that thing but if you will draw up the right kind of an agreement we will sign it.” Divers said, “What kind do you want, Captain?” He said, “One that has some reason in it.” And we just stopped talking right there and Divers left. We have never heard any more of it. Judge Divers did

(Deposition of J. R. Kelly.)

not say anything to me with reference to a suit by the Coca-Cola Company against me if the contract was not signed, that was the other representative. Later I got a letter from the general counsel of the Coca-Cola Company with reference to this same matter. Defendants' Exhibit #229 is a correct copy of the letter I got, to the best of my recollection it is.

Mr. LITTLETON.—He has got the original letter in his safe at home and if it is agreeable I want to let him keep it and put the copy in place of the original.

Mr. PIERCE.—All right.

Later I wrote a letter with reference to that same matter to the Southern Koke Company, Limited, at New Orleans. Defendants' Exhibit marked #230 is the letter I wrote to the Southern Koke Company, Limited. Defendants' Exhibit #229 is the copy of the letter which I sent the Southern Koke Company, Limited, to the best of my recollection.

Mr. LITTLETON.—We now tender and offer in evidence the papers identified by the witness as the Defendants' Exhibit #229 and #230 as evidence on behalf of the defendant in the above-styled causes. It is stipulated and agreed that the copy of the letter Marked Defendants' Exhibit #229 may be filed in evidence instead of the original letter which has been misplaced.

Cross-examination.

Peace saw me last August; that was the gentleman's name to the best of my recollection. I do not remember about the initials. There may have been

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some other little things that come up. It was substantially as I have stated in reference to this contract and conversation. The purpose of Mr. Peace's call on me was to get us to sign a contract not to sell anything except Coca-Cola. We talked about a great many other things, but that seemed [1342] to be his object. He may have seen Mr. Hyde first. Mr. Hyde stays in front and he came back in the back. Perhaps Mr. Peace did tell me that his purpose for calling to see me was to get me to enter into an agreement or contract, that I would discontinue substituting any other product for and as Coca-Cola. Mr. Peace did not show me one or more reports or test that had been made at our fountain. Mr. Peace did not inform me at the time that some samples had been purchased as and for Coca-Cola out of our fountain, samples of syrup, and that they had been analyzed and found not to be Coca-Cola. He did not say anything like that to me. He did not approach me on that at all. I did not know of any investigation having been made at our store of that character, only what Mr. Hyde told me that his man told him. I am pretty familiar with what goes on at the fountain, but it is not my business to serve. I am familiar with the arrangement of our fountain where we keep these syrups. I am no draftsman. We have lemon, vanilla, Coca-Cola, pineapple and all of them but I do not know what particular containers in the fountain each one of those are kept. I can go and look at the label and tell. I never been a druggist in my life. I have been bookkeeper for

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two years and a half. Prior to that I was justice of the peace at Gulfport for twelve years. I was not connected in any manner with the soft drink business prior to my connection with the Hyde Drug Company, consequently I am not familiar with what went on before that in the business. We handle Coca-Cola at the Hyde Drug Company along with this other product I suppose I got a reply to this letter I wrote the Koke Company. I do not remember, I have got all the correspondence. The letter referred to as being "enclosed" in this letter is Exhibit #229. I am not sure I received a reply to this letter. I suppose that I got the information I asked for. I cannot recall it. I have got my file at Ellesville in the safe.

Deposition of E. J. Williams, for Defendants.

E. J. WILLIAMS.

Direct Examination.

Age, thirty-one. Live Hattiesburg, Mississippi; engaged in drug business. I have a soda-fountain in my drug store. The name of my drug store is Owl Drug Store. We dispense Dope, Koke, Konut and Coca-Cola. This Koke and Dope are from the Southern Koke Company. When customers come in and ask for Koke [1343] or Dope we give them Koke or Dope. If a customer comes into our drug-store and asks me for either a Koke or a Dope I do not consider that he has made a definite and specific demand on me for Coca-Cola exclusively. When he asks for a Koke or a Dope and I serve him this New

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Orleans product I think I give him what he asked for. I have never had a customer reject the New Orleans product, Koke or Dope, when he asks for it as Koke or Dope, on the ground it was not what he asked for. I do not remember when it was, that is one of the salesmen of the Coca-Cola Company called on my brother there, and later there was a so-called attorney who called on me. This so called attorney, as well as I can remember was Pierce, that is the gentleman right there, Mr. H. B. Pierce. Mr. Pierce told me he was attorney for the Coca-Cola Company. He said he came there to see us about this substitution that they had been carrying on there, about bringing suit against the Owl Drug Store for substitution. I told him I had not been substituting any and he said we had, that he had the "Dope" on us, that he had sworn statements, et cetera. I asked to see them about us and he pulled out some stuff that he had gotten from some fellows, I do not remember who they were, that came in and claimed that one of these fellows came in and called for Coca-Cola, and got a six-ounce bottle of Coca-Cola and we sold Konut. The next fellow came in I believe and called for Konut—called for Coca-Cola and we sold Konut, and a fellow called for Konut, and I do not know what he said we served him, but anyway the fellow that come in and called for Konut got Konut. He did not get Coca-Cola. So he left a—I do not know what you would call it, he left something there to sign to avoid the suit, that is, if I would sign the paper that he give me there, there

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would be no suit against us. So I took a copy of it. Then I believe he came back down to the hotel, drew it up and brought it back up there and give it to me. I did not have time to read it and told him to come back later. He said he would come back later in the afternoon. He did and I had an attorney look at it during the time and he advised me not to sign it. I had studied it closely and I did not see why I should sign it. Defendants' Exhibit #227 [1344] is what I was asked to sign. In event I refused to sign that contract they were going to sue me here for that purpose. No one with my knowledge, consent, or acquiescence or connivance had been substituting Koke for Coca-Cola. If any of our dispensers had in fact sold Konut when customers asked for Coca-Cola I did not know of it. The manner of the attorney from the Coca-Cola Company, the way he approached me it did not appear to me calm and placid, that is one reason we sorter got mad from the upshot about the whole thing of it, the way he approached me. I had never been approached that way and accused of being a crook, *et cetera*, and so on. I was not easy about it. For what he said that is what I would think he meant, being dishonest about it. I did not sign the contract. That interview terminated very unpleasant to me and I guess to him too. Well, he came back in there in the night, after supper some time and I told him I was not going to—I do not remember everything that went on, but anyway I told him I was not going to sign the paper. He said, we will bring suit. One

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word brought on another and I asked him to get out of the store. I do not think he has been back in there since, either. A suit was subsequently brought against us by the Coca-Cola Company. That suit is now pending and undetermined. Mr. Pierce asked me where the contract was. I told him I had it in my safe and was going to keep it. I do not think he asked me for it.

Mr. LITTLETON.—I tender and offer in evidence as Defendants' Exhibit #227 the contract above referred to, to be used in evidence on behalf of the above-named defendants in the above-styled causes.

Mr. PIERCE.—Do you offer that here, they are not the same, this one is a copy, the one I wrote, I wrote in longhand and that one is not the same.

The WITNESS.—I have the original.

Mr. PIERCE.—Let's get it and if it is the same, why, put it in, but the copy at that time was written in longhand. I know a pretty bad hand, but substantially the one he got from me, was entirely different from that, no doubt it is.

Mr. LITTLETON.—With the reservation that if this is an exact copy of the original I want to tender this copy in evidence as Defendants' Exhibit #227 [1345] and with that understanding I tender and offer in evidence as Defendants' Exhibit #227, to be used in evidence on the trial of the above-entitled causes.

Mr. PIERCE.—And if Mr. Williams has the original I want to compare them before we leave;

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Mr. Williams has the original.

Mr. LITTLETON.—Yes, sir.

Cross-examination.

I am a member of the firm of the Owl Drug Company. My father, F. E., is the other member of the firm. I think that firm has been operating about eight years here in Hattiesburg. I had been in the drug business before. I have handled soft drinks about six years. I first saw this Southern Koke Company preparation sometime last year. Prior to that time I had been using Konut. Hagan & Dodd manufacture the Konut, of Atlanta. I do not know how long we had been using that product. We have been using it for some time, for two or three years I suppose. I believe that is the first one we used, that is to amount to anything. We had used some others, I do not recall them. Some other cola drinks, we had used different ones of them. We did use Coca-Cola ever since we have been in business. When Koke and Dope were called for we served Konut, Koke and Dope. We have been doing it all along. I could not tell you when I first heard the expression Koke and Dope. I have been calling for it that way myself ever since I can remember drinking Coca-Cola. I do not know what I was calling for, I would walk up to a fountain and call for a Dope. I did not drink any when I was a small boy. I could not get it. When I called for Dope, I wanted a cola drink, I reckon you will call it. I could not tell when I first began to ask for Dope. I have heard people walk up to fountains and call for

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a Dope ever since I have been in a drug-store, Dope and Koke. I have been in the drug business six years; that is where there was a soda-fountain. I have been in the drug business where there was no soda-fountain. I could not tell you how long prior to that I had heard the word Dope, I guess ten years. Heard of the expression Koke about the same length of time; a great many people would call Koke or Dope; Dope means Koke. There was all kinds of cola products at that [1346] time on the market. I am not familiar with the names but about three or four, Konut, Koke and Dope and Afri-Cola are about all I know of. I could not tell you as they were on the market ten years ago. Ten years ago I was not in the drug business. I could not tell you what people want when they asked for Dope ten years ago or what they got. I do not know how I arrived at the use of the word Dope; I do not know what they sold when Dope was asked for. I do not know what I wanted when I asked for Dope back there in those times. I just called for a Dope. Sometimes I reckon I wanted Coca-Cola; that is, a great many people, I reckon, when they wanted Coca-Cola would call it Dope, Dope or Koke. I do not know as that is true to-day. I do not know what a man wants when he asks for a Dope, whether Coca-Cola or what when he calls for Dope or Koke. To-day, if a man would ask for a Dope I would give him Dope or Koke. I do that because I have it in stock, I give him what he calls for. I have Coca-Cola in stock. I would not refuse to give him Coca-Cola,

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and we do do it, I have seen the boys do it, I have done it myself. As a rule, we give Koke or Dope. It is to my interest to do it, that is about all, and I try to give him what he calls for. In the conversation that I had with Mr. Pierce I did not admit selling the imitation product for Coca-Cola at the soda fountain. I was selling Konut all the time and Koke, when Koke or Dope were called for. I did not state in that interview that I was using about four hundred gallons of Konut syrup a year. I do not know how many gallons of that Konut syrup we did use. I never did run it up, I think of Konut we sold, I reckon, four to six to six hundred gallons. I do not know that it increased any. Our sales of Coca-Cola decreased over that period when we were using Konut because we had not been handling anything but Coca-Cola. It decreased very materially in 1912 and '13. I do not remember of a one calling for Konut by its name. We sold Konut there in 1912 and '13, on orders for Koke and Dope. I did not admit to Mr. Pierce in that conversation that I thoroughly knew and understood when customers asked for Koke or Dope that they wanted and expected to receive Coca-Cola. I do not know whether they expect that or not. I do not know whether they would want Coca-Cola or not, if they walked up and called for Koke or Dope how could I tell, I could not tell. I did not understand any such thing, [1347] that when a man asked for Koke or Dope that he really wanted Coca-Cola. I did contend that whenever a customer asked for a Koke or Dope he

(Deposition of E. J. Williams.)

Expected to get Coca-Cola, that I considered that I was within my rights to sell him Konut. I don't have to be in doubt about it, if he walks up and calls for Koke or Dope I do not see where I have to be in doubt about what he wants. I do not know that he wants Konut but that is what I give him for Koke or Dope. Konut is Koke or Dope; it is just as much Koke or Dope as Coca-Cola is Koke or Dope. If he wants Coca-Cola and calls for Koke or Dope he won't get Coca-Cola, if that was what he wanted. That is my choice in the matter. I am at liberty to do it and that is the reason I do it because I want to, because I like to do it. It is fifty cents a gallon cheaper; I guess I look after the most in that line. I keep that out as Koke or Dope. They come in and call for Koke or Dope, why would I give Coca-Cola when Koke or Dope would do. I give him what he calls for. We have made that rule here, as well as we could to give exactly what he calls for. I do not remember anyone calling for Konut. I never told one of my customers this was Konut I was serving them, nor advertised it. We have never advertised that we were selling this product of the Southern Koke Company. I do not know that they want Konut, that is what I give for Koke or Dope, just because I want to, is why. I used to give the Coca-Cola when he come in and called for Koke or Dope and it was all right to them. I gave them a Coca-Cola then and this product now, because I had Coca-Cola then. I did not have the other then, that was a good long time ago. I do not know how long

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Konut has been manufactured. All I know is since the time we have been handling it and I could not tell you how long we have been handling it. I did not state in that conversation with Mr. Pierce that I believed that it would be possible for me to induce all the drug-stores, and confectionery people dealing in this sort of thing in Hattiesburg who were handling Coca-Cola at their fountains, or in bottles, to agree to discontinue handling Coca-Cola entirely, nor that I was contemplating trying to bring about such an agreement. I told him not in that line, and every fountain, I told him I believed the majority of the concerns would do it. I told him I believed it could be done. I would sign up that I would not serve it. I did not state to Mr. Pierce that I had had an understanding [1348] with the Love Drug Company, the Corner Drug Company and the Yellow Pine Pharmacy, all of Hattiesburg, for the past two years regarding the use of the product Konut by these concerns to be sold by them when Koke or Dope was asked for at their fountains, and that I believed it would be possible for me to induce all of the drug-stores and confectionery stores in Hattiesburg who handle and sell Coca-Cola thru the fountain to form an agreement to discontinue the use of it. I just told him that I believed there was a good many of them that would do it. That it could be done, such a thing could be done, it was possible. I did not have any such agreement then or at any time, nor ever proposed any such an agreement with them. I would do it if the rest would do it. I think I have

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handled Coca-Cola exclusively. I do not know how long we have been handling this stuff, or how long we handled the other stuff. In the beginning the business I was handling Coca-Cola exclusively. At that time when customers came and asked for Koke or Dope I gave them Coca-Cola. That was not my understanding of what they wanted, that was what we gave them. We were not selling other cola drinks then. The suit was brought against the Owl Drug Company, of which I am a member. I believe there was an injunction entered against us in that suit but that was scratched out, taken out. Some paper they served, the way they had it drawn up prevented us from serving Coca-Cola at all, prohibited us from serving Coca-Cola at all. Our attorney informed us of that. Mr. Connor is our attorney. I do not know who served it. The marshal served it. The way it was drawn up we could not serve Coca-Cola, so our attorneys said. I never did read it, Mr. Cook did. I never read the second order. I do not remember that I have read the preliminary injunction. I do not remember seeing that.

Mr. LITTLETON.—That is an agreement to take testimony.

Mr. PIERCE.—Is it? I got the wrong document.

Mr. PIERCE.—That is the agreement there to take testimony, I do not think he ever did see that. We want to reserve the right, Mr. Littleton, to put a certified copy of it into the record.

Mr. LITTLETON.—They have not been identified. You can put them in by someone else, but he

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does not identify them.

I understand the first injunction restrained us from serving Coca-Cola. I [1349] did not read it, Mr. Woolfine, I believe he said it restricted us from serving anything that was the color of Coca-Cola, any drink, Coca-Cola or anything else; it was so drawn up that we could not serve anything that even looked like Coca-Cola. I understood the modified order authorized us to go ahead and sell Coca-Cola on calls for Coca-Cola or serve any other drink.

Q. Now, let me get your understanding of your first order; you do not mean to say that you understood that first order forbid your selling Coca-Cola?

Mr. LITTLETON.—I object to his asking the witness what he understanding was, as wholly irrelevant, cumbering up the record, if the counsel wishes to put the original order in and let it speak for itself, all right, but we do object to what the witness understood about it.

Objection overruled and appeal prayed and granted.

A. Well, now, I do not remember about that order, whether we could serve Coca-Cola or not, but it was so we could not serve any drink that looked like Coca-Cola as well as I can remember.

Q. What did you understand that the second order forbid you doing and in what particular did it differ from the first?

Mr. LITTLETON.—I wish to interpose the same objection to the question.

(Deposition of E. J. Williams.)

Objection overruled and appeal prayed and granted.

A. Well, we could go ahead and serve Koke and Dope on calls for Koke and Dope, under the last order. I think our attorney advised us we could sell Koke and Dope under this modified order. When a man called for Koke we could sell him anything, Dope or Coca-Cola. We did not have to sell him Coca-Cola on calls for that. I do not understand we are restrained from doing anything. Our attorney so advised us. I am sure he did. We have not carried on our business as dispenser of the Cola drinks any differently since this last or modified order was entered than we carried it on prior to the order being issued. It has been just the same, identically the same way. We considered we were restrained from doing nothing.

Q. That is your conception and you are so treating the order of the Court? A. Yes, sir.

Q. That is your attitude? [1350]

Mr. LITTLETON.—I wish to offer and interpose the objection that counsel is going into something not brought out on direct examination, he is making the witness his own witness, leading his own witness and further that it is incompetent, irrelevant and immaterial and move that the same be stricken out.

Objection overruled and appeal prayed and granted.

Our lawyers advise us after that injunction was sued out that we could serve Koke and Dope on calls for Koke and Dope and Coca-Cola on orders for

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Coca-Cola. Mr. Woolfine is a member of the firm, that was my understanding. He came and said we could go ahead and sell Koke and Dope and run like we have been doing.

Mr. PIERCE.—That is all. We will offer in evidence a certified copy of the original restraining order issued in the case of the Coca-Cola Company vs. F. E. Williams, Jr., and E. J. Williams, doing business as Owl Drug Company, rendered on the 21st day of July, 1914, and a subsequent restraining order entered by consent in the same case on a later date.

Redirect Examination.

Our attorney advised us that the injunction only prohibited us from selling some other product as and for Coca-Cola when Coca-Cola was asked for by its name Coca-Cola. We had been doing that anyway. We had not been substituting any other product so far as we were concerned so far as the manner in which we conducted our business was concerned, the injunction did not affect us one way or the other. If a customer should come into our store and ask for a package of cigarettes, I would not know what cigarette he wanted. We had Hires' Root Beer and Parke-Davis Root Beer in our store and a customer asked for root beer I would not know which he wanted. If Parke-Davis was cheaper than Hires' Root Beer, and the customer would know that the Parke-Davis was cheaper than Hires' it would not necessarily indicate to my mind that he wanted Hires' instead of Parke-Davis. I have seen the ad-

(Deposition of E. J. Williams.)

vertising that the Coca-Cola Company has done recently asking the public to ask for Coca-Cola by its name Coca-Cola and not by any nicknames. It has been repudiating any other name but Coca-Cola all over the country. Mr. Pierce, [1351] when he showed me his reports of the detectives on the occasion of his call at our place of business did not explain to me that they were the detectives of the Coca-Cola Company of which he was captain. Our customers know we run a soda-fountain, I reckon—I do not reckon that we have Coca-Cola on hand, we do not advertise it and put it on the fountain, we have it on hand. The names Koke and Dope do not designate any specific brand of Cola drinks. If a man comes in and says give me a Koke or Dope, I cannot tell what particular kind of drink he wants, and I cannot tell what particular brand of drink he wants.

Recross-examination.

I do not know what a cola drink has in it, I know there are drinks put up and claimed to be Cola drinks, Coca-Cola, Koke or Dope, Konut, those I have handled, I do not know what they have in them. The Coca-Cola people are advertising to ask for Coca-Cola under its true name I reckon because they want you to drink Coca-Cola, I do not know of any other reasons. I believe they claim it is very refreshing, one of the main points about it. I reckon they think you might get a substitute. (Placing in evidence the diagram of the fountain at the Owl Drug Store.)

Deposition of W. A. Hickman, for Defendants.**W. A. HICKMAN.****Direct Examination.**

Twenty-four years of age, live Monticello, Mississippi. I have lived there about 8 or 9 years off and on, engaged in the drug business. It is the Hickman Drug Store, it was the Cohn Drug Store about 4 months ago. I bought the Cohn Drug Store. I was in the employ of the Cohn Drug Store prior to the purchase of the drug-store by myself. I was manager there; we had a soda-fountain. I am about the fountain frequently so I can hear the names customers use in calling for what they want. We dispensed Coca-Cola, Dope and Koke. Koke is made in Atlanta, I guess. The Dope product we got from New Orleans, the Southern Koke Company. When customers come in and want a cola drink they use different names, Koke, Dope and Coca-Cola. When a customer asks for a Dope or a Koke I give them something cold, something refreshing, to satisfy their thirst. The word Dope means as applied to a soda-fountain beverage, why, I do not know, I do not guess it means any [1352] particular brand, you take a lot of people they call most any kind of a drink a Dope. They do not know one drink from the other but want soda water and call it Dope. I had a call from the representative of the Coca-Cola Company, his name was W. D. Gable, I believe; that was October 15th, 1914. He came into the store, I asked him in. He went back and sat down a few minutes, looked over the paper, directly he got up

(Deposition of W. A. Hickman.)

and asked for a Dope *and half* of it and said, "Hell, this is not a Coca-Cola." I said, "You called for Dope and got Dope." He said, "Well, that is not Coca-Cola." I said, Koke and Dope are the same thing and Coca-Cola is different. He said "You have been substituting this Dope stuff to people when they call for Dope or Koke. Coca-Cola is what they want." I told him I did not know what they wanted, that there were two kinds, Dope and Coca-Cola and that we have both on to sell and if you had called for Coca-Cola I would have given you Coca-Cola and he talked on and said he wanted to see that company or "These damned people here sued." He said they already had a suit at Hattiesburg against the Owl Company, Owl Drug Store and that a decree was entered keeping them from handling Dope, this New Orleans product. He said if we did not quit handling it they would sue us. His manner was very abusive; he seemed like he did not have a bit of respect, and that he was proud of it. He said he would like to go back and look at my barrels. I told him I did not have any dope in my warehouse to show him. He did not tell what concern he was with until he drank a half, I guess he had drank a half glass before he told me, he had drank it and told me he was with the Coca-Cola people and was around trying to catch people selling Dope, a detective I guess, another one of the detectives who go around over the country spying on the trade. I wrote to the Southern Koke Company at New Orleans with reference to that matter. Defendants' Exhibit #231 is the

(Deposition of W. A. Hickman.)

letter I wrote the Southern Koke Company.

Mr. LITTLETON.—I now tender and offer in evidence as Defendants' Exhibit #231, the letter identified by the witness, dated Monticello, Mississippi, October 24, 1914, and tender and offer it in evidence on behalf of the defendants in the above-styled causes.

Cross-examination. [1353]

I have not the letter of the 24th with me, it may be on file. When I return I will get that letter and forward it to the commissioner to be filed in this record. When a customer calls for a Koke or a Dope they want any cola drink, that applies to all character of soft drinks. I have been in the drug business about 15 years. In the line of cola drinks during all that period, I have handled just Dope and Coca-Cola. Prior to becoming owner of the Hickman Drug Store I was with the Cohn Drug Store, that was the same concern. The Cohn Drug Store handled the same thing, the product of the Southern Koke Company and Coca-Cola. They handled this product of the Southern Koke Company ever since I have been with them, it would be about two and a half years ago. A lot of people call for Koke or Dope and do not know what they want. I have asked several. Asked what kind of drink you want. They say I don't know, anything, what kind of cola do you sell here. I give them Coca-Cola and sometimes they do not like it. If a man calls for a Dope I give him a Dope and if he calls for a Coca-Cola I give him a Coca-Cola. I do not know whether

(Deposition of W. A. Hickman.)

people that ask for Dope or ask for Koke may want Coca-Cola. You take people where I am they do not know, you cannot find two out of ten there that know Coca-Cola from Dope, they are not used to them, I have tried the two drinks. A lot of people they could not tell the difference in Coca-Cola from Dope and Koke, there may be people that can. The two drinks look the same and taste the same, a customer receiving it would not know the difference. Prior to going into the drug business I was salesman in a drug store. I have heard the terms dope and koke used before I went into the drug business. I knew of different matters, I knew there was two companies handling it, a lot of people do not know it. I could not tell the first time I heard those terms applied to a soft drink, 4 or 5 years I guess maybe. I did not specially know of the Southern Koke Company until I began business. I knew of Coca-Cola, I had seen the advertisements, it is not so overly advertised in my country down there, the public as a rule in my community know of Coca-Cola. I knew of Coca-Cola, Gay-Ola, Ola and two or three other different drinks. When I went to a [1354] soda-fountain I always called for Coca-Cola when I wanted it, but I sometimes called for Dope and then I got anything they had. When I asked for Dope they give me Dope or Koke, I would not know what to expect. When asking for it I wanted something cold I did not care what it was. If they served lemon soda, or strawberry, that would have been perfectly satisfactory. I had a call from the rep-

(Deposition of W. A. Hickman.)

representative of the Coca-Cola Company. He claimed to be a detective, I could not tell you that he was a salesman he did not offer to sell any Coca-Cola to me. The first time I saw him was then. He told me he was representing the Coca-Cola Company, that he was around catching those people, and he also showed me a number of analyses where they had found parties had not been handling Coca-Cola altogether. He showed me a record of the gallonage I had bought from the Coca-Cola Company, he did not show me that of other concerns, just showed me mine. There are 3 or 4 other dealers in the town I think. In our fountain we have different jars for them, two jars, the jar that had dope in it has Coca-Cola on top and Dope, I have just a little sign up there "Dope"; the jar that contains Coca-Cola has a Coca-Cola sign. It is a little celluloid piece, the jar goes with the fountain. I keep the Dope in a jar, sometimes one and sometimes in another, in a soda-water jar, the Dope. I am in attendance at the fountain myself always. I serve all the people. I never serve Dope or Koke when Coca-Cola is called for, if they ask for Dope I give Dope. For a Dope he gets Dope and if he asks for Coca-Cola he gets Coca-Cola. I may have handled Coca-Cola exclusively, a week, something like that, prior to that time, if a customer told me he wanted Dope I would give him anything, strawberry, lemon, lime, anything. I pay one fifty and one twenty-five. There are some rebates on that dollar and a quarter, and I get a rebate on Coca-Cola. I buy Koke and Dope from the Southern Koke Com-

(Deposition of W. A. Hickman.)

pany, Koke or Dope is the same product, it costs a dollar and a quarter and I get a rebate. I get a rebate of 25 cents for paying in a certain length of time, if it is not paid then it is the full amount. We are rebated for the number of gallons we use during the year for Coca-Cola. I handle this product because it is cheaper than Coca-Cola, that is my reason for handling it, but if he asks for Coca-Cola he gets [1355] Coca-Cola every time. I make more money on it and get the same price for the product over the counter, it is as good a drink, and he cannot tell the difference from the Coca-Cola. I will bet you I can go to the fountain and you cannot tell the difference. If he asked for Coca-Cola and I served him Dope, he would not know the difference, I guess that is very nearly true of every customer. This Gable he just asked for a Dope and I give him a Dope and he said, "Hell, this is not any Dope, that means Coca-Cola. This is a God damned old Dope." He set there for several minutes and one of the doctors come in. I looked to have a little trouble. I had to leave, you know, and he stayed around, and he went on down the street. He liked to have gotten into trouble down the street. He is a very insulting fellow. If he had come in like a gentleman there would not have been anything to it. Other representatives of the Coca-Cola Company come in and proceed to treat me nice like I first opened up. He told me that Dope and Koke were nicknames for Coca-Cola, he said if a man called for a Dope or Koke he wanted Coca-Cola. I do not know whether

(Deposition of W. A. Hickman.)

a man wants Coca-Cola or not when he calls for Dope or Koke.

Redirect Examination.

I do not serve Dope or Koke when our customers ask for Coca-Cola, and the reason is I do not know what they want when they ask for Dope or Koke, they do not designate any specific drink.

Recross-examination.

(Referred to Exhibit #231.) I just wanted to see Mr. Patton if they could sue me for handling Dope. He guaranteed me that I would not be sued if I would handle the Dope. I asked him about it when he first came there. The first time I bought from him and he said he would guarantee me I would not be sued for selling it, guaranteed me against being sued by the Coca-Cola people. They had been threatening our people here and I asked them about it and told them if they were going to sue those people, I did not want to get into it and be sued myself. They were suing them for handling substituting Dope for Coca-Cola. The way I understood it, they claimed the people that were handling Dope and Koke, on calls for Coca-Cola that they were substituting, not giving what they wanted, if I did not know right [1356] then, that is the reason I wrote the Southern people asking about it. I had heard in different ways about the various suits. I did not think at first when I began handling it, that I would be prosecuted. We did not make any agreement, Mr. Patton said, "I assure you there won't be anything to it at all." I asked about it, asked if they

(Deposition of W. A. Hickman.)

sued these other people around for handling Dope would I get into trouble for handling it. He said, "No, there is nothing to it." He did not guarantee it, he assured me I would not be trouble. I do not know whether I bought the first from him or through the house by mail. You take most traveling men they call for Coca-Cola, when they want Coca-Cola, they call for Coca-Cola by the name of Coca-Cola. The traveling men do when they come in my store. People use the terms, Dope or Koke, I would not think they meant Coca-Cola altogether. The public don't know about them unless they read and see the different names, advertisements and such as that; pick up any paper, Coca-Cola is advertised in the paper, the other products I could not tell you, advertisements of them lately are just a few cards, we displayed a few of those advertisements, something like blotters, something like a month ago I had a few. I did not have hangers on the fountain of the Southern Koke Company nor Coca-Cola either. Most of our customers know we are handling that product. A few I do not tell and a few I do. I do not get outside and tell it you know. I handle these other products because they are cheaper.

Redirect Examination.

I handle Dr. Pepper at our soda-fountain, I do not know who makes it. I get the extract and make it myself and I forget who it is from, it is not Hire's Rootbeer, this is a fruit root beer. I have frequent calls for root beer at my soda-fountain. They do not know I have it, they call for it. I do not know how

(Deposition of W. A. Hickman.)

our customers know I have orange, lemon, lime and those things, we do not advertise them, they are not advertised, plastered all over the country. We handle cigars at our drug-store also, some cigars cost more than others. If a man comes in and asks for a cigar and does not mention a brand I would give him the cheapest if I did not know what he wanted. Just one Coca-Cola is all I know and but one Dope that I know of, that is the New Orleans product, Dope. When a man comes in and [1357] calls for a Dope, I do not know, I give him what he wants.

Deposition of Mrs. M. C. Dozier, for Defendants.

MRS. M. C. DOZIER.

Direct Examination.

Sixty-five years of age; Woolfolk Walker is my oldest brother; he persuaded me to go into Coca-Cola and I furnished the money, \$1,200 for the purchase of my interest, but what my interest was I never have found out. I never got any money for the sale of it. I never got any money for what it made, you know, or receipts from the making of it. I never knew anything at all about it, I could not tell you anything to show that I owned an interest in Coca-Cola. I could not say whether or not Woolfolk Walker, my brother, put any of his own money into Coca-Cola at the time of this purchase, or if he had any money to put into it. I was living up here and he was living in Columbus. He borrowed a thousand dollars after I paid the twelve hundred dollars to him to buy the interest. I did not know

(Deposition of Mrs. M. C. Dozier.)

at that time who it was, but finally it proved to be Mr. Lowndes and Mr. Venable. He borrowed a thousand dollars from me, explaining that he would get it back in a few days. I very reluctantly let him have it because I wanted it for a home, and he paid me back three hundred dollars of that money and that is the only money he ever paid me, and later I have lived in Atlanta but could not get any knowledge what I had or any interest in it. (An exhibit marked Complainant's Exhibit #82, dated December 10, 1887, purporting to be a conveyance to you and Woolfolk Walker for a consideration of eight hundred dollars from Lowndes and Venable for their interest in Coca-Cola syrup and extract and the registered label in the patent office.) I have signed a paper of this sort, at Mr. Venable's soda-fountain, his drug store. It was on the corner of Marietta and Peachtree. I said, "Is that mine?" He said, "No, I will give you a copy." But the copy I never received. I have urged him very much to give me a copy. I urged my brother. I subsequently found that paper, I found it when I broke up housekeeping and went to live with my son-in-law. I was looking through my old papers in an old trunk and to my surprise and consternation I came across this, showing I really did have an interest in Coca-Cola. I found it about 3 years ago, a little over perhaps, between 3 and 4 years. After I found it I gave it to my son-in-law to look at and to see if it [1358] was really of any value and he carried it and showed it to a lawyer and I took it and saw in the paper an

(Deposition of Mrs. M. C. Dozier.)

article that Mr. Candler had written, that he had gotten the Coca-Cola in some old way and then I took it to Mr. Lilly, who is a nephew of my husband and asked him if he would look into it as I found I did not know what value it was and wanted to know, but I have not got that paper now, Mr. Lilly has it I suppose. After the purchase of this interest in Coca-Cola I did not sell my interest to anybody. I could not sell it when I did not have it, I did not know what I owned. (A paper marked Complainant's Exhibit #67 dated the 17 day of April, 1888, purporting to be a conveyance from Woolfolk Walker and Mrs. M. C. Dozier of the formula for Coca-Cola syrup and extract, and the label and title in Coca-Cola syrup and extract to Asa G. Candler.") I cannot, with my best knowledge and consent say that I signed such a paper. I did not sign any paper conveying my interest to anybody, I did not know what interest I owned. I never signed any paper in the presence of Mr. F. M. Robertson that I remember. If I did I think I would remember it, but I could not positively say I did not, because I do not think I know Mr. Robertson and Mr. Wylie and therefore I do not have any remembrance whatever of ever signing any such paper because I had no knowledge of the sale of Coca-Cola. I first found out that Mr. Candler was claiming an interest in Coca-Cola in the summer of—I do not know the date. I could not swear to the date of the year, but it was that summer, it had been sold two weeks, and my bother had gone west before I had any knowledge whatever of

(Deposition of Mrs. M. C. Dozier.)

the sale of it and I said although I owned an interest, but where is my authority to show, I had no paper to show, I had no authority, I never was given a paper to show, so it was sold without my consent or without my knowledge.

Q. I hand you a paper marked Complainant's Exhibit #74, purporting to be a conveyance from you and Woolfolk Walker to Asa G. Candler of the same thing, Coca-Cola and of the formula and extract, dated the 24th of August, 1888, purporting to be witnessed by F. H. ——— and S. H. ———. J. P. I will ask you to state whether or not you signed any such document as that.

A. No, sir; I could not swear I signed that. I would not be willing to [1359] swear I signed it, in fact I do not know anything about it, I never saw that and never heard of it. I signed no paper to the Coca-Cola Company with not any witnesses to them. I did not sign any paper at all conveying any interest to Asa G. Candler or anyone else. I remember that positively because I knew nothing of it.

Q. I hand you Defendants' Exhibit #126, purporting to be a note signed by Asa G. Candler, dated August 30, 1888, made payable to Mrs. M. C. Dozier for \$200, and on back of it purports to be indorsed by M. C. Dozier, I will ask you to state whether or not a note of that kind was ever turned over to you and whether or not you indorsed it.

A. No, sir; most positively I never received a cent. The signature on the back looks like mine but I would not swear it was mine because I never received any

(Deposition of Mrs. M. C. Dozier.)

money, I never received any notes, I never endorsed any notes.

Q. I hand you another paper marked Complainant's Exhibit #129, being another note signed Asa G. Candler, and it looks like it is intended to be Asa G. Candler, dated August 30, 1888, made payable to Mrs. M. C. Dozier for \$200? And this purports to be endorsed by M. C. Dozier; I will ask you to state whether or not you received that note and endorsed it.

A. No, sir; I never received any money whatever. I did not know whether I owned it or not until after I found that paper. After I had purchased this interest in Coca-Cola all that I know is that on one occasion I went down to see it made.

Q. That is what I am speaking of.

Mr. HIRSCH.—Do not lead the witness, I object to that.

Objection overruled and appeal prayed and granted.

I never had any agent or anybody to make Coca-Cola syrup for me. My brother, shortly after this, about August, 1888, went to Hot Springs, so I heard, he did not tell me good-bye, not a word. I never hear from him after he left. I wrote repeatedly but none of my letters were ever recognized or answered. He never paid me back the balance of the thousand dollars he borrowed. I could not get any paper to show that I had loaned him the thousand dollars or any paper to show that I had advanced [1360] to him the twelve hundred dollars that was

(Deposition of Mrs. M. C. Dozier.)

put into Coca-Cola until I found this paper, that is the first evidence. I do not know as he is the same Walker that was a member of the firm, Walker, Candler & Company. My brother now is dead, so I have heard. I did not bring suit or take any proceedings to enforce my rights to the interest in Coca-Cola after I found out Mr. Candler was laying claim to it because I had nothing to show Mr. Candler I was the owner of it. I did not know whether it was put in my brother's name entirely, and sold in his name or whether part of it was put in my name. My brother taught me to write, that is Woolfolk Walker. He is the oldest and I was the youngest of seven, and I was taught to write by him during the summer, during vacation. I never saw him write my name. I do not remember whether he did or not, he had charge of the estate and all the estate papers. I do not know what he did, I was young at the time. I did not know whether it was in his name entirely and sold in his name entirely or whether I could come in and get anything or have any recognition. I had nothing to show Mr. Candler that I owned an interest in it, because all papers were kept from me and I have not seen my brother but once in a year since he lived in Atlanta.

Cross-examination.

My brother, Mr. Woolfolk Walker actually engaged in the manufacture of Coca-Cola, so I understood at the time, when I was around the plant I saw him around the plant, he lived there, he moved to the plant, at least he had a room rented, a room

(Deposition of Mrs. M. C. Dozier.)

and boarded out. I saw him around the plant at the time I gave him the twelve hundred and the thousand dollars, and he worked with Coca-Cola right along, he traveled for it right along at one time. He came to me and said he wanted to buy an interest in Coca-Cola, he wanted it to buy an interest with for which I advanced him twelve hundred dollars for my interest. I had sold my home in Columbus, Georgia, and he had transacted the business, had sold it for me and he knew I had this money and he asked me, said that he was obliged to have some money for a few days and would I loan it. I told him no, I could not because I wanted to buy a little home, and he said, "Well, I will return it to you in a few days because I must have it." I said, "Well, if I loan [1361] it to you it will displease my husband very much." He said he would pay it back to me. He did not tell me what he was going to buy with this thousand dollars. The twelve hundred dollars I turned over to Woolfolk Walker. I do not know and could not say what he did with it, and that is why I did not say anything about it, because I do not know what it has been used for. He had told me, however, that he was going to buy an interest for me in Coca-Cola. He worked around there, around the plant where the Coca-Cola was being made. I thought that I had an interest in it. I could not find out how much or what interest I had, he did not tell me. (Complainant's Exhibit #82.) I did not read the paper when I went to Mr. Vanables to sign it, I said, "What is this paper

(Deposition of Mrs. M. C. Dozier.)

for?" He said, "It is to convey you the property. I will give you a copy and send it to you." Mr. Walker said that. That looks like my signature. I did not read the paper over but that paper looks like the one I had, I am not sure that is the one I had. Mr. Little had the one I had, that is Mr. John D. Little, the attorney here in Atlanta. That is the one that they said Mr. Venable and Mr. Lownds sold, that is the interest. My brother never did send me a copy. My brother was staying at my home when my brother died and he occupied her room after her death and her trunk was there and that trunk, when my sister went away she wanted it so I took all the papers and everything that was his and hers and put them in a hat-box that was also hers and in a yellow envelope with some old estate papers, when I went to move I thought it was well to get rid of all papers that I did not need, so I went into this band-box and took out the papers and in taking them out discovered this that is my own first knowledge of it, except as to signing it and what they told me. I cannot say whether that is the paper or not. I signed a paper for Mr. Venable and Lownds. After I paid out my money and after I signed this paper I knew that my brother and others were manufacturing Coca-Cola and that he was traveling for them, that is what he told me. I went to the place of business and saw him around there, he carried me down and showed me where they were making it.

(Complainant's Exhibit #67.) I have no knowl-

(Deposition of Mrs. M. C. Dozier.)

edge of ever seeing it. I saw that in Mr. Little's in the fall of 1914, that is the first I saw of [1362] it. I told Mr. Little of this property. The first person I told was my son-in-law, his name is Mr. Ridley, J. F. Ridley. I suppose I showed this paper to him. (Complainant's Exhibit #82.) I suppose that was about 3 years ago, no, it has not been quite three years because I did not show it to him when I first moved with him in Parietta three years ago. I could not swear that it was last fall that Mr. Little and myself met in Mr. Little's office, now that Defendants' Exhibit #67 was presented to me. I do not know what papers were presented to me. One had a big red seal on it, I do not think that is it; it had a big, great big seal down here, and it had around that seal, Coca-Cola Company. I never knew up to that time what he actually bought. I cannot say whether that is my signature or not. I never saw Complainant's Exhibit #74 before to-day in my life. I never have seen but one paper and that paper is the one that had the amount that Coca-Cola was sold for. One paper was presented to me that had a very peculiar signature, but it was not one of those that I remember. I could not swear that is my signature on Complainant's Exhibit #74, as I do not know anything about it. I never saw Complainant's Exhibits #127 and #128 before in my life. I do not know anything about those notes at all, I was kept entirely ignorant of all the facts by my brother who had charge of it. He had charge of the whole thing and never discussed it with me at all, in fact, when he got control

(Deposition of Mrs. M. C. Dozier.)

of it he never came near me at all and kept the information away from me. I remember the meeting we had in Mr. Little's office. That was when I consulted him about the paper I found, you came over and showed me the papers which you had. I could not swear whether they are the same papers which you presented to me to-day or not.

Q. 113. Did you or did you not, Mrs. Dozier, admit that the signature of Mrs. M. C. Dozier, Exhibit #174 was your signature?

A. You will remember that you showed me a paper and he said "Aunt Maggie, is that your signature?" I said, "I never saw it." He said, "I know it is" (that is Mr. Little). And it certainly looked like it, and then there is another paper, [1363] too, about what the Coca-Cola was sold for, and the next question he put, I said, "Mr. Hirsch, may I look at this? I heard it was sold for twenty-five dollars and a ticket to the West and I am anxious to know what it did sell for." You said, "Certainly, you are very kind." I looked at the paper, I was a trying to make the most of the loss, I was a trying to see, and he said, "Aunt Maggie, you know that is your signature." Well, I was surprised and I did not answer, you remember, Mr. Hirsch, and then he said, a second time, "You know, Aunt Maggie, that is your signature." I said, "Well, I suppose it is," every word I said, and then you got up and took the papers and left and I left; that was every word that was exchanged. Mr. Little just said, "Well, Aunt Maggie, if that is the case, then what can you do?"

(Deposition of Mrs. M. C. Dozier.)

I did not want Mr. Little to be involved in anything. I just wanted to know the true history of the paper and I had never seen the paper because I did not know of the sale of the Coca-Cola, and if I did not know of it how could I sign it. To the best of my knowledge and belief I cannot say it is or its not the paper. My brother, Mr. Woolfolk Walker, carried on the entire transaction in regard to Coca-Cola. I gave him twelve hundred dollars to buy my interest with. After that I never heard any more of it. He never came near me any more. He actively engaged in the business at first but he did not afterwards, because they moved away from down there. I saw my brother often after I gave him the twelve hundred dollars, but I did not see him after I loaned him the one thousand dollars. I suppose I advanced him the thousand dollars a week afterwards. I saw him between the time I gave him the money to buy the interest and the time I loaned him the thousand dollars. I suppose he was actively engaged in the business. He seemed to be. He claimed a title to it. I saw him a few moments, just a few moments in the summer before he left here the last time. I just met him and he did not tarry five minutes. Don't ask me what years those were. About 1888 or 1889,—won't the papers say that, August? It must have been then.

Q. 142. That shows you bought in April and one paper purports to sell in April and the other in August, it was around those dates? [1364]

A. Was not all of it bought at one time?

(Deposition of Mrs. M. C. Dozier.)

Q. 143. No, he first bought part of your interest and the second bought all of your interest, those papers purport to show that?

A. It is all news to me; I do not know anything about it, Mr. Hirsch.

Q. 144. But the time I am asking about, Mr. Walker, was about the time of those papers, from April to August, 1888.

I advanced the twelve hundred dollars that winter, it was bought. In 1887, I think it was. I cannot remember the date but I think about that time, wasn't it, 1887?

Q. 147. This shows 1888.

Mr. LITTLETON.—Another paper shows December 14, 1887.

Q. 148. Well, about that time?

A. Yes, sir, about that time, it was bought.

Redirect Examination.

(By A. B. LITTLETON. Esq.)

I saw Walker making the Coca-Cola. I went down there once. I never went where he was making it, bottling it, where he put it up there and I saw him bottling the Coca-Cola which I suppose he had an interest in, and he said so, but I do not know who the bottling works was owned by at all, I never could find out. I tried. That was in the spring after he moved down there on Marietta Street, that is the bottling works was put up. It must have been, as near as I can get it, in '88, because he lived on the corner of Courtland and Courier Streets in '87. It must

(Deposition of Mrs. M. C. Dozier.)

have been early in the spring. I cannot say positively what month.

Recross-examination.

(By HAROLD HIRSCH, Esq.)

I said my brother moved from Courtland and Courier Streets down on Marietta Street and rented two rooms, so that we could be more convenient to the business, and it was when I went down there I saw it, on Marietta Street. I signed this paper, buying that interest in December, 1887, and Mr. Venable was at the corner of [1365] Peachtree and Marietta. I do not remember the date.

Redirect Examination.

(By A. B. LITTLETON, Esq.)

Mr. Little did not advise me as to the statute of limitations. He said that I would not be barred by the statute of limitations, I think, he said, as well as I can remember, I won't say this, I think, but as well as I can remember he said that was confined *to not noted* if I understood him right, but not to this. I mean the statute of limitations was confined to notes. I do not know that he said that. I tried to get other advice as to my rights in the premises, from some other source. It was only shown to Mr. Hill. He said he did not know whether there was anything in it, I would be barred by the statute of limitations. Prior to this visit that I made down to the plant I never seen any Coca-Cola made prior to that time.

Mr. Charley Pemberton told me he was making it. It was in the afternoon and there was a big kettle like planters make syrup during the war when I went

(Deposition of Mrs. M. C. Dozier.)

down there, out in the little back room in the extreme "L" of the residence, when I went down there. He was stirring, I do not know whether it was a stick or a spoon, whatever it was, but I remarked how black it was, I suppose the syrup must have done that, that was the only time I was down there, and the only way I knew it was Coca-Cola was what they told you. I never tasted it.

Mr. HIRSCH.—Mrs. Dozier, do you remember who else was there at that time when you went to the manufactory?

A. Yes, I remember clearly, my sister.

Mr. HIRSCH.—Who is your sister?

A. Mrs. Dantnigac, or Augusta, she is dead now.

Mr. LITTLETON.—Mrs. Dozier, what was the character of your brother's handwriting, did he write a good deal like you or different from you?

A. Well, sir, the the formation of our letters were obliged to be somewhat alike, because he taught me to write.

(These were all the depositions taken and filed by defendants.) [1366]

Plaintiff's Rebuttal Testimony.

(The following depositions were taken by the plaintiff in rebuttal, at Birmingham, Alabama, on June first and second, 1915.)

Deposition of S. A. Ellis, for Plaintiff (In Rebuttal).

S. A. ELLIS.

Direct Examination by Mr. HIRSCH.

I reside at Woodlawn, a suburb of Birmingham.

(Deposition of S. A. Ellis.)

I have been in Birmingham pretty well all of the time for the last fifteen years. I am 65 years old. Yes, sir, I was connected with J. C. Mayfield, Sr., in the soft drink business in 1902, I believe it was. I think that was the year. He was doing business then over on Morris Avenue. He was manufacturing drinks of different kinds, I couldn't name all that he handled, I don't know. The concern was called the Celery-Cola Co. You ask what was the name of the syrup he was manufacturing; well, I don't know that he said. He was manufacturing "Celery-Cola" syrup, or Cola syrup, I think that was what they called it. He employed me simply to canvass the town to the various stores and to take orders for the goods that were hauled out in wagons, and I was rather superintending the delivery of the goods that were delivered from the wagon. I was not connected with the manufacturing at all. "Celery-Cola" was the principal thing that was being delivered from the wagons. He also had some other drinks—soft drinks of different kinds—different flavors, you know. I don't recall to mind now the names of any of the others besides "Celery-Cola."

(This witness, having claimed his witness fee for attendance, \$1.50 was paid him by counsel for plaintiff.)

(There was no cross-examination of this witness.)

**Deposition of L. M. Barclift, for Plaintiff (In
Rebuttal).**

L. M. BARCLIFT.

Direct Examination by Mr. HIRSCH.

I reside at 1904 Alois Avenue, Birmingham, Ala. I have resided in Birmingham thirty years. I am 51 years of age. At present, I am traveling for the A. C. L. Haase & Sons Fish Company of St. Louis, Missouri, for which concern I have been traveling for about a year. Before that I traveled for Swift & Company in Texas, Oklahoma and Arkansas in the soap department. [1372] Yes, sir, I was at one time connected with the Schooler Vinegar Company located at Birmingham, Alabama. I was with the O. L. Gregory Vinegar Company and Schooler Vinegar Company mixed up together, about seven years. I was with the Schooler Company when it was bought out. I understood that Mr. J. C. Mayfield bought it about 1902, somewhere along in there, after which purchase I was employed by Mr. J. C. Mayfield, Sr. The name of the concern was the Mayfield Manufacturing Co. I was employed as traveling salesman. I was with the Mayfield Manufacturing Company off and on—I can't say exactly, but for about a year, something like that, and then I went back to Paducah, Ky., to O. L. Gregory, and then I got sick and had to go to the hospital, and, while I was sick, Mr. Mayfield came up to see me and said that when I was able to go to work he wanted me to

(Deposition of L. M. Barclift.)

come back with him, which I did. Mr. Mayfield was not running any other business at the time besides the Mayfield Manufacturing Company, that I know of. That concern was located on Morris Avenue, South Side, at 20th Street, in Birmingham. You ask if I can name some of the people that were employed by that concern at that time; well, I can name the people that were around there, supposed to be working for them. Mr. Pogue, I believe it is—I forget his name—was one, Mr. John Ensley was another, and there was two or three colored boys there all the time. Yes, sir, Mr. Garrett was at work. I sold everything that the Mayfield Manufacturing Company gave me to sell, which was vinegar, cider, and bitters—some kind of bitters, I forget what it was they called that—“Jiggers,” I believe they called that. Yes, sir, I sold “Celery-Cola” for them in syrup and in bottles. I don’t remember that I sold any “Pepsin-Ola” or “Hop-Ale.” You ask if, in my experience, and while I was working for them, I ever heard of any product manufactured, advertised, sold, or handled, or anything done with it, or pertaining to it, spelled by the name of “K-O-K-E”; no, sir, I didn’t. That was concerning the Mayfield Mfg. Co. The first I heard of Mr. Mayfield manufacturing or making “Koke” was, I think, in 1913, at Little Rock, Ark. You ask if I ever heard of him making, manufacturing, selling, or advertising—either Mr. Mayfield or any of his companies that I worked for—a product by the name of “Koke” up to that time; not until that time. I would like to make one statement if it’s

(Deposition of L. M. Barclift.)

proper. While I [1373] was working for the Mayfield Manufacturing Company you understand, I was practically out on the road, and so far as anything that they manufactured in the building, that wasn't in my province, but I know I never sold anything of that kind or heard anything of that kind.

Cross-examination by Mr. DART.

You say that my last answer indicates to your mind that I was a vinegar salesman, primarily; well, cider and vinegar, yes, sir; that was my specialty, I sold what they gave me. You say that every salesman has a trade of his own, or a line of his own, and you ask if I had none; well, I was working for the Mayfield Manufacturing Company and they paid me a regular salary and I sold what they gave me to sell. I had been selling vinegar and cider for two years. I was in the employ of the Schooler Vinegar Company for about seven years—them and O. L. Gregory together—selling cider and vinegar. You ask if I hadn't made any trade or business in that period; only cider and vinegar. That was my line at that time. I don't know that I was known as a cider and vinegar man, or any other kind of a man. Yes, sir, I had a trade in vinegar and cider and I was sent out on the road primarily to sell vinegar and cider, that was my business. If I handled any soft drinks at that time, my main idea was to sell vinegar and cider.

Redirect Examination by Mr. HIRSCH.

I was called here under subpoena. Yes, sir; I claim my attendance fee and expenses. I have an

(Deposition of L. M. Barclift.)

itemized list of my expenses and I will present them.

(The witness having claimed his attendance fee and expenses the same was paid to him by counsel for plaintiff, the sum amounting to \$25.)

Recross-examination by Mr. DART.

You ask who asked me to come here; I was telephoned to by Mr. George Bodaker—that gentleman there (pointing to the gentleman in question) at Dathan, Alabama, that there was a subpoena for me, yes; sir, the gentleman sitting in the room here looking at me. You ask who he is; well, he was formerly Chief of Police of this city here. No, sir; he did not tell me that the Coca-Cola Company wanted me to come here to testify. He told me that there was a subpoena from the United [1374] States Court for me and if I would agree to come that he would pay my expenses without having to have me summoned by an officer. Yes, sir; I had been summoned by an officer; since arriving here I have been given a subpoena from the Court. No, sir; he did not tell me what he wanted me to come here and testify to. No, sir; I don't mean to say that I entered this room without any idea of what I was going to testify to. I don't mean to say anything—I mean to answer your questions. You say that I am very clever, and you ask me again if I didn't know when I came into this room what I was going to testify to; well, I understood I was a witness for the Coca-Cola Company. I understood that from the subpoena, and no other way at all. I came into this room, which is a room in a hotel in Birming-

(Deposition of L. M. Barclift.)

ham, in company with Mr. Pogue. No, sir; he did not introduce me to the room, not practically. Before I came into the room I came up 20th Street with Mr. Pogue. I was in the adjoining room a few minutes ago with several gentlemen, not only with Mr. Pogue, but with several others. No, sir; I did not say that I came all the way from home to this place and came into this room and sat in that chair without having spoken to anybody before I came into this room as to what I knew about this case. When I came from home this morning I came in on the South Ensley car. I walked up to Mr. Bodeker's office and then walked from there up to this hotel with him. He went away and I met this gentleman, I believe (indicating Mr. Pierce). I only spoke to them, just met them, and that's all. Before I came and sat in this chair I had not talked to anyone on this subject—on this question—on this case, about what I have been testifying here. No, sir; I have not repeated to any one, either wholly or in substance, what I have said in this room, nor any part of it. Yes, sir; I talked about other things. Mr. Bodeker and I were walking up the street and we talked about several different things—about Mr. Patton, an officer who used to be here, a friend of mine, getting shot and died. Anything else I talked about had nothing to do with this present matter except that Mr. Bodeker brought me up here and introduced me. I live a mile and a half or two miles from this place. Mr. Pearce, I believe, sitting there, told me to make up my memorandum of expenses

(Deposition of L. M. Barclift.)

and witness fee, that's all he said to me in that connection. [1375] No, sir; there was no talk about anything in this case besides what I have said, not a word. I got this telephone message from the Chief of Police about 12:30 yesterday. Yes, sir; Mr. Bodeker is an old friend of mine. He told me over the telephone that I had been summoned before the United States Court to testify in behalf of the Coca-Cola Company, I had never had any dealings with the Coca-Cola Company, and hadn't any idea what they could possibly want with me. All that I have been talking about occurred about 1902—about twelve or thirteen years ago. No, sir; it is not all perfectly fresh in my mind. Yes, sir; I think I could recollect something else that happened in 1902 besides what I have been testifying about. To be positive about the dates, etc., I am not. I don't think Mr. George W. Bodeker is still Chief of Police. I think Mr. Martin Egain is. Yes, sir; I have talked to Mr. Bodeker within the last eight or ten years. The last time I talked to him on any subject was, I think, somewhere about two months ago. I was talking to him about my son having an employment with him. No, sir; my son is not employed by him. No, sir; I did not ask him to get my son employment he was asking me if I thought the boy could do certain things for him, but he did not do them. No, sir; I did not say this morning that I had gotten this telephone message at a hotel in Chattanooga. I didn't say he had telephoned me in Chattanooga recently. I think it was some

(Deposition of L. M. Barclift.)

sixty days ago that he telephoned me in Chattanooga. He asked me to come to Birmingham, saying that he wanted to see me on a piece of important business, and I came in response to that telephone message from him. You ask what was the important business that he wanted to see me about; I made a statement in writing to a young lady stenographer up there—I believe Mr. Bodeker's daughter—in regard to this business—practically the same as you have been asking this morning. She took my statement down. I don't think there was any one present but the stenographer, but Mr. Bodeker came in later. I went to Mr. Bodeker's office in the Brown-Marx Building to make that statement. I believe Mr. Bodeker asked me the questions in front of the young lady. You say that I said I made a statement first and Mr. Bodeker came in later, and you ask if that is what I mean to say; I mean to say that I was there—he was there when the young lady took it down and then she wrote it off and I signed it, after he left—he asked me the questions and she took them down in short hand and wrote it down and handed it to me and I signed it. Mr. [1376] Bodeker had gone. Now to get the story straight, about sixty days ago Mr. Bodeker telephoned me at the hotel Patton in Chattanooga to come to Birmingham on an important piece of business, and, when I got here, I went to his office and there he asked me certain questions and I made certain replies, which a young lady took down in short hand. She afterwards wrote out the questions and I signed

(Deposition of L. M. Barclift.)

the statement. You ask me how that tale compares with what I have been swearing here the last twenty minutes—that before that I had never spoken to anybody on this subect matter and was speaking from a memory perfectly fresh, although ten years old, and you ask which is true the first or the last; I think it's practically the same. You say, no, that I said, and stuck to it under your cross-examination, that I had never spoken to anybody about this matter until I came into this room and sat in this chair; I said to-day, and you asked me to-day. That's what you implied. You asked me when I came from home if I had been talking to anybody on this subject, as I understood it. I make the distinction that you asked me whether I had talked to anybody to-day. You ask if I didn't think it was fair to volunteer that I had talked to somebody sixty days ago; I think it's fair and proper to say what I say here, or anywhere else, or at any time. I wasn't paid anything except my railroad fare for coming down from Chattanooga to talk to Mr. Bodeker. He paid my railroad fare and expenses. Yes, sir; while I was working for the Mayfield Company I sold other things besides cider and vinegar. You ask how much I sold of anything else; I couldn't say—I sold right smart "Hop Ale" and some Bitters and some cider and vinegar and some "Coca-Cola" syrup—I mean "Celery-Cola" syrup. I didn't sell any individual bottles, but I sold several gallons of the syrup. I sold it to merchants and contractors—different people over the country—I can't remem-

(Deposition of L. M. Barclift.)

ber who. You ask me to give the names of some of those to whom I sold it; I sold it to quite a few people, I can't remember all of them right now. I sold J. D. Miller and Bros., I believe it was, some cider and vinegar. They were railroad contractors, and I sold Mr. Neal and Mr. Phillips, who were railroad contractors, and I sold Walton-Wilson & Company at Copper Ridge, Tennessee, a lot of stuff. I sold them principally cider—what we called cider. I sold very little of anything except cider and vinegar and [1377] “Hop Ale.” No, sir; I did not go to any of the bottlers and sell anything to them, that was not my work. I had nothing to do with the bottlers. I sold some “Coca-Cola” to people that were practically asking for it—so many of the contractors around here would say “send me some ‘Coca-Cola’”—I mean “Celery-Cola.” You say that I have three times used the word “Coca-Cola” for “Celery-Cola” and you ask which is right; “Celery-Cola,” I mean, I just had “Coca-Cola” on my mind. I don't know how much I sold, I may have sold 200 or 300 cases. I might have sold fifty, I don't remember, but as a general thing I never sold any unless somebody asked me for it, but I did sell some without being solicited. You ask how much the ex-Chief of Police paid me for coming—about sixty days ago—from Chattanooga. I forget, something like \$10. You ask if that is what it cost me to come here; well, I had to go back you understand. You ask how far Chattanooga is from here; I think the fare is \$4.00 and something—\$3.98 or something like

(Deposition of L. M. Barclift.)

that, and he paid me something like \$10.00, I don't remember exactly the amount. I don't say that occurred sixty days ago, but about sixty days, the papers will show. You say that I can remember what happened thirteen years ago very accurately, but I can't remember sixty days ago; no, I can't give you the exact date, I have it in my book. I will have to get my book and get the exact date. Yes, sir, I have an independent memory—something like sixty days ago. I think the amount of money I got from the Chief of Police about sixty days ago was about \$9.00 and some cents, that's as near as I can get to it.

Re-redirect Examination by Mr. HIRSCH.

Mr. HIRSCH.—“We tender in evidence as Plaintiff's Rebuttal Exhibit Number 1, the subpoena issued to Mr. Barclift, an itemized statement of his expense account and receipt from the railroad and I hereby present to the witness \$25.00, as shown by the statement.

(The document marked Plaintiff's Rebuttal Exhibit #2 is the statement I signed in Chief Bred-eker's office.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit #2.)

(Defendants object to the introduction of Plaintiff's Rebuttal Exhibit #2 because the witness has already given his testimony and [1378] it is secondary evidence. Objection overruled. Exception.)

(Deposition of L. M. Barelift.)

Re-recross-examination by Mr. DART.

You ask which I stand on this testimony I have given here this morning or this statement? (Plaintiff's Rebuttal Exhibit No. 2.) I stand on both of them. You ask if I want them to dove-tail together; I want them to be just exactly what I swore and what I signed. If there is any difference between the two statements,—this document which I signed on April 11th, and the testimony I have given under oath here, to-day,—I stand on this oath and on that signature. I don't remember that this statement was under oath. I don't think anybody swore me to it. You ask, if there is any difference between my testimony and my signed statement, which you shall accept as true; bring me up again—give me a new chance. Well, what I have testified to here is the truth—as far as I know. There might be a difference in the questions asked here and in the statement. What I have sworn to is the truth, as far as I know.

Deposition of Charles J. Pogue, for Plaintiff (In Rebuttal).

CHARLES J. POGUE.

Direct Examination by Mr. HIRSCH.

I want to make a statement. I was summoned by the Commissioner the last time that they were taking evidence here, to examine some witnesses for the other side to this case, and, being associated with Mr. Mayfield, I naturally talked to some of them, and I don't think it's really fair myself, to the other

(Deposition of Charles J. Pogue.)

side, to allow me to testify in this case. I make that as a claim of personal privilege for myself.

I have been served with a subpoena to come here this morning together, with a *subpoena duces tecum*, to bring what papers I had in my possession, and I have brought the papers with me and that is the package right here. I left them with the Commissioner this morning. I will say further that I object to these letters being introduced here as a great many of them are personal matters touching upon a case while I was in St. Louis which we were trying to compromise and did finally compromise.

Mr. DART.—“In protection of the witness we object to the bundle of papers being opened. He has claimed privilege and he is here without a lawyer protecting him and we ask that the Commissioner [1379] seal up that bundle of papers referred to by the witness, and certify the question to the Court.”

Mr. HIRSCH.—“I think before we are through we may have some other questions to refer to the Court.”

Mr. DART.—“Mr. Hirsch has opened the package of papers after the objection, and after hearing the witness' claim of privilege. He is violating the man's claim of privilege; he has got him in a room of a hotel by himself without counsel, and I think it is unfair, in view of his statement, for counsel to deliberately open the papers, which he claims to be his own personal papers. I now ask that the papers be sealed up by the Commissioner and sent up to the

(Deposition of Charles J. Pogue.)

Court for a decision on the question.”

Mr. DART.—[Addressing the witness]. “As we understand the law, that package is your property, and, having claimed the privilege, you have a right to the possession of it until it is taken away from you by the Court, in our opinion of the law.”

Mr. HIRSCH.—“We, in reply to that statement, say there was a subpoena *duces tecum* issued by the Court to the witness to produce these papers.”

I reside at 1210½ Avenue H., South Birmingham, Alabama.

Mr. DART.—“I wish you to note, Mr. Stenographer, that while these questions are being propounded to the witness by Mr. Hirsch, Mr. Rogers, one of counsel, notwithstanding the objection of the witness, opens the package and begins to read the contents.”

I have made Birmingham my home about eleven years. I never lived here prior to eleven years ago, but I visited Birmingham every sixty or ninety days for a good many years prior to that. Yes, sir, I know Mr. J. C. Mayfield, Sr., and have known him since the early part of the year 1904. Yes, sir; Mr. J. C. Mayfield was present at the time I said I was in the defendant’s employ in this case to subpoena witnesses. I don’t recollect exactly when it was. I haven’t no idea, I have been around the country some—I have no idea. I think it was about March of this year. Yes, sir; I saw Mr. J. C. Mayfield at the time the Commissioner gave the summons to me. No, the

(Deposition of Charles J. Pogue.)

Commissioner here now taking testimony is not the one, it was another gentleman. I [1380] don't remember his name. I was in Birmingham at the time of the trial of the case of the State vs. Melville Rice and I was in the courtroom when the case was called and Mr. Mayfield put on the stand, but I left the city immediately and went to Norfolk. That was the same Mr. J. C. Mayfield that was put on the stand at that time as the Mr. Mayfield that I saw here when the defendant was taking testimony. I know a colored fellow that I always called "Dick," whose name I have been told is Jas. Dickson. I understood that he was arrested about the time of the trial of the case of the State versus Melville Rice. I found him in jail and I suppose he was arrested. You ask, if as a matter of fact, I found at his house certain material that came from the Celery Cola, or the J. C. Mayfield Manufacturing Company; I think Mr. Bodeker found some things in his house which I identified as the property from this company. You ask if I placed those things in his home; well, I object, I refuse to answer that question. I refuse to answer it on the ground—I refuse to answer it on the ground of incriminating myself.

I worked for the J. C. Mayfield Manufacturing Company and the Celery Cola Company, and, during some litigation that we had at one time while I was in St. Louis, they notified me that I had been elected Vice-President of the Mayfield Manufacturing Company and gave me power of attorney to settle a law-

(Deposition of Charles J. Pogue.)

suit they had up there, or prosecute it, which I finally compromised without going to trial. I began work for the J. C. Mayfield Manufacturing Company in the early part of 1904, and I was with that company and with the Celery Cola Company until the fall of 1906, I guess it was. My duties with those companies were that I looked after the interests of the company on the outside and sold goods and made some contracts with friends I had made around here, etc., and then, if there was any suing of anyone, or anything like that, I did that, and did the collections. Some of the boys around here would attempt to collect and couldn't do it, they were all turned over to me. For some time I was on the road traveling,—made some trips to the southern part of the state selling goods. That was when they were on 20th Street. Then afterwards I was in St. Louis, I guess possibly a year or a little over. I was there looking after some litigation that I had—infringement of the trade name, “Celery Cola.” [1381]

You ask if I can name some of the employees that were employed by the J. C. Mayfield Manufacturing Company, or the Celery Cola Company; well, there was Mr. Mayfield's boys, S. T. Mayfield and J. W. Mayfield, and then later on Carl—he was a young boy down on Morris Avenue, he was down there a good deal, but he was young—didn't take any active part in the business. Then Mr. D. E. Moody worked there and Mr. Barclift, I don't know as I ever knew his initials. Then over there on Morris Avenue there was a fellow named Benjamin and a fellow

(Deposition of Charles J. Pogue.)

named Adams, who lives in Columbus, Mississippi. Miss Alice Wheeler also worked there, and there was a bottling plant there that changed hands several times, different people owned it,—but I knew very little about the bottling plant. And some negroes worked around the place. No, sir, Melville Rice never worked on the south side. He worked a short time on Morris Avenue, a short time before I quit. Yes, “Dick” worked there. You ask who else worked at either one of the two places; well, I will tell you, there was nicknames for all of them, there was one white fellow called “Dog Face,” I don’t know what his name was, and don’t know now what his name is.

Mr. DART.—“Here I ask the stenographer to note again that while Mr. Hirsch is asking the witness questions, Mr. Rogers, one of counsel, is examining the papers in the bundle which the witness objected to counsel examining and asked protection against examining, and I prot  st in behalf of the witness again.”

Then there was a boy named Howard Trent and Mr. Garrett was bookkeeper there. Then we had a lot of stenographers, I don’t know how many of them. I knew the names of some of them, and of others I did not. They would have some extra work and telephone up town to get a girl and she would work there a short time, and then they had two of the Miss Armstrongs who worked there on Morris Avenue. Then there was a whole lot of bottle washers and boys in there, negroes working there, that I don’t recollect the names of. If I would see them I

(Deposition of Charles J. Pogue.)

would know them, but I don't know the names—we always had nicknames for them. As I understood it the Mayfield Manufacturing Company just prior to 1904 had bought out the Schooler Vinegar Co. You ask if there was a concern in St. Louis, also that Mr. J. C. [1382] Mayfield was connected with; as I understood it they had a plant there which Mrs. Brooks and her son and S. S. Jerome were operating under the name of the Celery Cola Company of Missouri, and they made a contract to buy their extracts or syrups from the Mayfield Manufacturing Company, but after they got possession of the plant they procured a formula somewhere and we didn't get any more orders from them. After investigation, we found they were making stuff and selling it as "Celery Cola," and they began writing threatening letters to customers over the country that if they didn't buy from them they would sell—I remember one concern particularly, the Robert Portner Brewing Company. I remember seeing correspondence and all, where Mrs. Brooks threatened that if they didn't buy "Celery Cola" from her she would sell "Celery Cola" under the price they had been buying it at, and that was the cause of the suit being filed there against that company. I finally went up there and the result of it was that we finally made a settlement satisfactory to all parties concerned. The plaintiff in that case was the J. C. Mayfield Manufacturing Company, and the defendant was the Celery Cola Company of Missouri. The case was filed in Judge

(Deposition of Charles J. Pogue.)

Ryan's court in St. Louis. I guess it was in the latter part of 1905, or maybe the spring of 1906, when it was settled. I don't remember the time exactly. I don't remember exactly when it was that I severed my connection with Mr. Mayfield's enterprise. I don't remember whether it was near Christmas of 1907, or afterwards, in 1908. From 1904 until I severed my connection, the J. C. Mayfield Manufacturing Company manufactured cider and vinegar on South 20th Street, and extracts and syrup for soda fountains and bottlers, then we had a sherbert there — sort of cheap wine or cider which we sold as a sherbert—that was the principal business. Yes, sir, they made "Celery Cola" there and, I understood there was "Pepsin-Ola" made there, but I don't know that of my own knowledge. The Celery Cola Company sold different kinds of bottlers and soda fountain extracts and vinegar, apple cider, those sherberts and "Hop-Ale"—I don't recollect, I think possibly the Mayfield Manufacturing Company sold some "Hop-Ale," but not as much as the Celery Cola Company did after it began operations. [1383]

No, sir, I don't remember the names of those extracts and syrup for fountains. You ask if, during the entire time I was connected with the J. C. Mayfield Manufacturing Company, the Celery Cola Company here in Birmingham, or the Celery Cola Company in Missouri, any or either of these concerns made, manufactured, sold, advertised, handled, dealt in or had any advertising matter for, any product

(Deposition of Charles J. Pogue.)

with the name of "Koke,"—"K-O-K-E?" Well, I was out on the road some, as I stated, and I can't answer that question. You ask if they ever made, manufactured, sold, advertised, or had any labels, containers, barrels, half barrels, kegs, or anything else with "K-O-K-E" on it, as far as I know, at any one of the places, or any of the companies, that I have enumerated heretofore; well, of my own knowledge, I refuse to answer that question—I don't—the position I was in—well, I don't want to answer that question. I was connected with Mr. Mayfield in the capacity there, as I have stated, and, further, he and I had some interests in Tennessee, in an oil field at one time, and, during that time, I attempted to negotiate the sale of some coal lands in Tennessee that he had some interest in, or control over, or something, and I went up to Kentucky with some gentlemen here looking after their oil interests, and I was in Nashville a good deal trying to do something with this coal. While in St. Louis looking after this lawsuit, I received a great deal of correspondence from Mr. Mayfield and I talked to him a great deal over the telephone about it. As I remember it, Mr. Mayfield wrote his attorney there and gave me a letter of introduction to him. I was not an attorney, but I went there as a sort of detective to see if I couldn't get at the bottom of the thing and see what amount of goods they had been selling, so that we could make some basis of complaint as to the amount that they really owed us. It was hard to get at, but I finally

(Deposition of Charles J. Pogue.)

succeeded, I think, in doing that.

Mr. HIRSCH.—“Now, Mr. Dart, you can make a note in the record that Mr. Hirsch is examining the package of papers. I now make the statement for the record that I am examining the papers produced by Mr. Pogue under the subpoena *duces tecum*.”

The WITNESS.—“I wish you would make a note there that I object to him examining it.” [1384] The attorney I mentioned awhile ago in St. Louis, to whom Mr. Mayfield gave me the letter of introduction, was the City Attorney at that time, Thomas L. Anderson—he’s now Judge there, appointed Judge there recently, as I understand.

Mr. DART.—“Inasmuch as we have no way of protecting the witness, or of having this question tested immediately while the gentlemen are searching the private papers of the witness, we wish to put on the record an objection that this is not rebutting testimony, and that no foundation has been made for the present remarkable proceeding.”

Mr. HIRSCH.—“Put down in the record that Mr. Pogue is examining the papers before counsel is doing so.”

The WITNESS.—“And I object to doing so, and I object to the papers being presented in this Court.”

Mr. DART.—“Please note on the record that the examination he is now making was after Mr. Rogers had made quite an extensive examination, which extended during the whole period the witness was under examination by Mr. Hirsch, and that Mr. Hirsch

(Deposition of Charles J. Pogue.)

made some examination before he invited the witness, in answer to his last protest, to come and separate his private personal papers.”

(The witness was directed to go through the package of papers and pick out such as had no reference to the subject matter of this litigation and retain the same; and such as referred to the subject matter in question to be set apart to be used by counsel. The witness proceeded to sort out the documents as stated, after which examination proceeded as follows, to wit:)

I haven't any idea in the world how many letters, papers and things I think I have examined. I imagine it is a hundred or more. I noticed the printed matter on the letters or documents as I was running through. No, sir, the name “Koke,”—“K-O-K-E” did not appear on a single solitary one of them. “Celery Cola” appeared on some of them, and some of them were just blank paper. “J. C. Mayfield Manufacturing Company” was on some of them and “Celery Cola Manufacturing Company” was on others. Plaintiff's Rebuttal Exhibit #11 is a list of the stockholders of the Celery Cola Company as they appeared on the [1385] books of that concern. I don't know what the shares were or who were the stockholders, personally. I received the letter signed “J. C. Mayfield,” addressed to “Dear Pogue,” dated December 15, 1905, which is filed as Plaintiff's Rebuttal Exhibit #12. That is J. C. Mayfield's signature to that letter. The letter dated

(Deposition of Charles J. Pogue.)

December 18, 1905, signed by "F. T. F. Johnson" and addressed to "J. C. Mayfield, Esq., Birmingham," being Plaintiff's Rebuttal Exhibit #13, was sent to me by Mr. Mayfield enclosed with Plaintiff's Rebuttal Exhibit #12. There was some stationery printed here in June like Plaintiff's Rebuttal Exhibit #12, and then there was a lot of other stationery "Mayfield Manufacturing Company," and also some of the Celery Cola Company. The letter from "J. C. Long, chemist," addressed to "Chas. J. Pogue" at St. Louis, being Plaintiff's Exhibit #14, was received by me, and, also, I talked to Mr. Long. I received the letter which says "Dear Pogue" and is signed "J. C. M.," being Plaintiff's Rebuttal Exhibit #15. Now, as for this envelope in which the letter is, there was a whole lot of envelopes around there—there was some, as I remember it, that had "Detroit, Michigan," printed on it, and some of them had "St. Louis, Missouri," on them. They had some that had the same kind of heading on them, "Celery Cola." That letter, Rebuttal Exhibit #15, was written by Mr. J. C. Mayfield, Sr. The letter dated April 22d addressed to "Dear Pogue" being Plaintiff's Rebuttal Exhibit #16, is a letter-head which I received at St. Louis. They used some of these for Celery Cola, too, they had some lithographed that had "St. Louis" printed on them, and they would stencil "Birmingham" across them sometimes. That letter seems to be just a part of one written by Mr. Mayfield. The letters dated June

(Deposition of Charles J. Pogue.)

15, 1906, signed "J. C. Mayfield," and addressed to "Dear Mr. Pogue," being Plaintiff's Rebuttal Exhibit #17, was a letter-head that was used by the Celery Cola Company, but the officers were changed there later on. I don't remember whether the letter-heads showed the change or not—Moody, Secretary, or Secretary and Treasurer, I don't remember. Yes, sir, I received that letter and that's Mr. Mayfield's signature to it. The telegram and the envelope in which it is enclosed from J. C. Mayfield to C. J. Pogue sent from Dallas, Texas, to P. O. Box #1228, [1386] St. Louis, Missouri, both the telegram and envelope being filed as Plaintiff's Rebuttal Exhibit #18, were received by me. I received from Mr. Mayfield right after I arrived in St. Louis the letter dated May 21, 1905, addressed to "Dear Pogue" and signed "J. C. M." on the stationery of the J. C. Mayfield Manufacturing Company, Birmingham, Ala., being Plaintiff's Rebuttal Exhibit #19. I received the letter in the envelope addressed to Mr. Thomas L. Anderson, St. Louis, Missouri, on which envelope appears "J. C. Mayfield Manufacturing Company, 'Celery Cola,' Kansas City, Missouri," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #20. They used these envelopes sometimes, and had something like that, with different cities, some had Detroit, some had St. Louis—a whole lot of them were left over in St. Louis, and they shipped a lot of them down to Birmingham to use. Mr. Anderson delivered this letter to me after he broke it open and read it. I received the letter

(Deposition of Charles J. Pogue.)

addressed to "Mr. J. Mayfield" with a letter therein signed "J. C. Mayfield" to "Mr. C. J. Pogue, St. Louis," dated May 20, 1905, on letter-head reading, "J. C. Mayfield" with "Celery Cola" thereon, being Plaintiff's Rebuttal Exhibit #21. I registered under the name of "J. Mayfield" when I first went to St. Louis—hadn't given them my real name—thought I would do some detective work. I received the envelope addressed to "Charles J. Pogue, St. Louis, Missouri," with printing on it, "J. C. Mayfield Manufacturing Company, Celery Cola," care of Thomas L. Anderson, with a letter therein, dated "Birmingham, Ala., December 19, 1905," signed "J. C. Mayfield," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #22." Yes, sir, I received the telegram filed as Plaintiff's Rebuttal Exhibit #23 and I also had a paper somewhere giving me authority to exercise my own judgment. Plaintiff's Rebuttal Exhibit #24 is a letter-head used by the Celery Cola Company of Missouri,—Mrs. Brooks and her son, E. J. Brooks and Jerome. I received the telegram directed to "Charles J. Pogue, St. Louis" from "J. C. Mayfield," which is filed as Plaintiff's Rebuttal Exhibit #25. I received the envelope and letter filed as Plaintiff's Rebuttal Exhibit #26, the envelope being addressed to "Mr. Charles J. Pogue, St. Louis, Missouri, P. O., Planters Hotel," and having on it "J. C. Mayfield Manufacturing [1387] Company, "Celery Cola." This was some of the stationery in use by the J. C. May-

(Deposition of Charles J. Pogue.)

field Manufacturing Company at that time. They also used a lot of old ones that we shipped from St. Louis,—this has St. Louis marked on it. This letter-head was printed here in Birmingham and was used there with some of the other letter-heads, some of this one and some with “Celery Cola” letter-heads. Yes, sir, I received that letter. I don’t recollect what the letter dated December 15, 1905, signed by the Tennessee Carbonator and Supply Company, filed as Plaintiff’s Rebuttal Exhibit #27, is. I don’t recollect what that is. I received the letter addressed “Dear Pogue” and signed “J. C. Mayfield,” being Plaintiff’s Rebuttal Exhibit #28. I note it was returned to Birmingham, and I suppose I took it up and credited them with it and returned it to Birmingham, on account of it being damaged in some way—I don’t recollect, I don’t know that it is. Mrs. Brooks told me the prices she quoted the Brewing Company, and intended to go out on the road and sell it to anyone she wanted to. The letter-head as shown by Plaintiff’s Rebuttal Exhibit #29 was used by the J. C. Mayfield Manufacturing Company there and also the “Celery Cola” letter-head, and sometimes, some of the letter-heads were steel engraved, like that on the envelope from St. Louis,—shipped from St. Louis with “St. Louis” printed on it. That had St. Louis on it—that was the only difference, and some of them were printed and some lithographed. I received the letter in the envelope directed to “C. J. Pogue, Birmingham,” in the left-hand corner of which envelope is “return to J. C.

(Deposition of Charles J. Pogue.)

Mayfield, Vandervilt Building, Nashville," which letter and envelope are filed as Plaintiff's Rebuttal Exhibit #30. My recollection is this letter was mailed to Mr. Garrett in the envelope, with a letter to him, and then handed to me. Plaintiff's Rebuttal Exhibit #31 is a cut of Mayfield Manufacturing Company that they used when I first went there, and then they changed it when they moved to Morris Avenue. They changed it to 2112 Morris Avenue, and the cut was used at St. Louis. Plaintiff's Rebuttal Exhibit #32 is one of the shipping tags that was used for tacking on barrels of "Hop Ale." I received the letter in the envelope addressed to "C. J. Pogue, St. Louis, Mo.," being Plaintiff's Rebuttal Exhibit #33. [1388]

It is a copy of a letter Mrs. Brooks wrote to the Robert Portner Brewing Company of Danville, Virginia, and she told me that she had written them too and she told me she was going to sell these goods wherever she pleased. That was before we forced a settlement—settled the case. I received the letter and envelope filed as Plaintiff's Rebuttal Exhibit #34. The envelope has on it the address, "J. J. Pogue, St. Louis, Mo.," and printed on the envelope "J. C. Mayfield Manufacturing Company, Celery Cola." Inside is a letter to "Dear Pogue" not dated, signed "J. C. M." This was old letter-heads that we shipped here from St. Louis with Kansas City on it—there is a whole lot of it there. Plaintiff's Rebuttal Exhibit #35 is an envelope with a

(Deposition of Charles J. Pogue.)

letter therein. The envelope is addressed to "C. J. Pogue, St. Louis, Mo.," and has on it "St. Louis, Mo., Celery Cola." That's the envelope used in St. Louis and a lot of them were stamped "Birmingham" that were shipped from St. Louis to Birmingham. The letter inside this envelope is addressed to "Dear Pogue" and is signed "J. C. M." It is from J. C. Mayfield, and I received it. The envelope filed as Plaintiff's Rebuttal Exhibit #36 was in use in St. Louis, and there was a lot of that here, and sometimes they would pick them up and use them,— I am not positive, but I think I shipped some here myself. I received Plaintiff's Rebuttal Exhibit #37, which is addressed to "C. J. Pogue, St. Louis." On the envelope is "J. C. Mayfield Manufacturing Company, Celery Cola"; the letter inside is dated "May 25, 1905," and signed "J. C. M." On the stationery is "J. C. Mayfield Manufacturing Company, Manufacturers of Celery Cola." This is one of the letter-heads which the J. C. Mayfield Manufacturing Company used. I don't remember when the Celery Cola Company was organized, but they had "Celery Cola" letter-heads, too, and these are some of the old envelopes. I don't recall that the J. C. Mayfield Manufacturing Company had any other kind of stationery besides that, except that it had different localities printed on it, and except, possibly, that some was engraved and some was merely printed, and I don't recollect any other kind of stationery that the Celery Cola Company had.

(Deposition of Charles J. Pogue.)

Plaintiff's Rebuttal Exhibit #38 is one of the old letter-heads of St. Louis. [1389]

A lot of them were shipped down here and stamped "Birmingham"; the letter is notifying me, as district salesman, that they had just received a car-load of pure apple cider. The letter is from J. C. Mayfield. Plaintiff's Rebuttal Exhibit #39 is one of the old St. Louis letter-heads, and the letter is from him to me wanting me to go to St. Louis that night. Plaintiff's Rebuttal Exhibit #40 is a letter written by J. C. Mayfield, Sr., giving me authority to give bond for the Mayfield Manufacturing Company,—I don't think it was drawn legally. Plaintiff's Rebuttal Exhibit #41 is a letter addressed to J. W. Adams and C. J. Pogue, at Columbus, Mississippi. On the envelope is "J. C. Mayfield Manufacturing Company, Celery Cola." On the letter inside is "J. C. Mayfield Manufacturing Company, Celery Cola," and the letter is dated November 16, 1904, addressed to "Dear Mr. Pogue," and signed by "J. C. Mayfield." This is the letter-head and the envelopes,—old St. Louis letter-heads and envelopes that they used there and stamped "Birmingham" on them. It is from J. C. Mayfield. I would like to say about this letter right here, I remember that letter, and it was in reference to "Hop Ale" that was shipped to Columbus, Mississippi, and the prosecuting attorney there under the laws claimed that there was a little too much alcohol in it—we had no trouble with it here—that's what it was.

(Deposition of Charles J. Pogue.)

I received Plaintiff's Rebuttal Exhibit #42. The envelope is addressed to "Mr. Charles J. Pogue," and on the envelope is printed among other things, "J. C. Long Laboratory." I received that from Long. I requested him before I left Birmingham to write me. I received Plaintiff's Rebuttal Exhibit #43 from Mr. J. C. Mayfield. It is addressed to "Dear Pogue," signed "J. C. M." dated January 11th,—or first, I can't tell exactly which,—1906. I told Mr. Mayfield over the phone once or twice when he wrote me important letters to send them by express, that they had sort of gotten on to me doing some work and I was afraid they would get on to the mail. I received Plaintiff's Rebuttal Exhibit #44. Mr. J. C. Mayfield, President of the J. C. Mayfield Manufacturing Company gave me that authority, appointing me City Salesman and authorizing me to make collections and contracts. I don't know what Plaintiff's Rebuttal Exhibit #45 is, [1390] but it's a blank torn out of one kind of an old order book that J. C. Mayfield Manufacturing Company used to use,—I don't know how it ever came into my possession. I don't know anything about it, don't know what it is, but they had some old order books around there, some of them with blanks. I received Plaintiff's Rebuttal Exhibit #46, from J. C. Mayfield. The envelope is addressed to "Honorable J. C. Pogue, St. Louis," and there is printed on there "Celery Cola, Extracts, Soda Water Supplies." The letter inside has printed on it "Celery Cola" and is addressed to "Charles J. Pogue, St. Louis, Dear Mr. Pogue," and is signed "J. C. May-

(Deposition of Charles J. Pogue.)

field." I received Plaintiff's Rebuttal Exhibit #47 and enclosures. The envelope is addressed to "Charles J. Pogue, St. Louis," and has printed on it "Celery Cola Company." On the inside are two labels and a letter on "Celery Cola" stationery, dated "Birmingham, Alabama, April 3, 1909" to the Bay City Bottling Works, Bay City, La., signed "Celery Cola Company by J. C. Mayfield," and inside of it seems to be printed advertisement. In the same envelope there is another letter to C. J. Pogue from Mayfield dated 4/2/06, printed "Celery Cola, Extracts." Inside the envelope also is a return envelope on which is printed "Celery Cola Company, Birmingham, Ala., 2114-2116 Morris Ave." I received from Mr. J. C. Mayfield, Plaintiff's Rebuttal Exhibit #48, being a letter addressed to "Charles J. Pogue, St Louis, Mo., Planters Hotel." On the envelope there is printed "J. C. Mayfield Manufacturing Co., Celery Cola" and stamped with "Birmingham, Ala." The letter inside is on "J. C. Mayfield Manufacturing Company" stationery dated "Birmingham, Ala., May 20th" and addressed to "C. J. Pogue" and signed "J. C. Mayfield." I received from Mr. Mayfield Plaintiff's Rebuttal Exhibit #49. The envelope is addressed to "C. J. Pogue, St Louis, Mo." and has printed thereon "J. C. Mayfield Manufacturing Company" and "Celery Cola, Kansas City, Mo." with "Birmingham, Ala." stamped over it. The letter inside is dated January 12, 1906, is addressed to "Dear Pogue," and is signed "J. C. Mayfield." Plaintiff's Rebuttal Exhibit #50 is an envelope ad-

(Deposition of Charles J. Pogue.)

dressed to "C. J. Pogue, St. Louis, Mo., P. O. Box #1238" in the top of which is printed "Celery Cola Company, Extracts and soda fountain supplies" addressed "Birmingham." Inside said envelope is a letter addressed to "Dear Pogue" signed "J. C. M." and it is printed "Celery Cola [1391] Birmingham, Ala." That's one of the loose leaf sales sheets of the Celery Cola Company,—that's the Celery Cola letter-head. Plaintiff's Rebuttal Exhibit #51 is a list of the parties that Mr. Baxter gave me that formerly worked for the Mayfield Manufacturing Company at 18th and Olive Streets, St. Louis, Mo. It is what he told me was the weekly pay-roll. I got it for the purpose of securing some evidence from these parties in a suit we had against the Celery Cola Company of Missouri and I had no idea I had it in my possession. Plaintiff's Rebuttal Exhibit #52 is a letter which I received from Mr. Mayfield with that list of stockholders of the Celery Cola Company in it. The letter is written on the stationery of the Mayfield Oil Company, Nashville, Tenn. I received Plaintiff's Rebuttal Exhibit #53 from Mr. Mayfield. It seems to be a letter dated August 25, 1906 to Mr. Charles J. Pogue from Mr. J. C. Mayfield on stationery of the "J. C. Mayfield Manufacturing Co." I had contracted for some coloring from Canfield there. He had made some shipments and they had turned out to be worthless and he was writing and telling me they were absolutely worthless. Plaintiff's Rebuttal Exhibit #54 is a letter-head that was used by the Celery Cola Company. Plaintiff's Exhibit #55 is

(Deposition of Charles J. Pogue.)

some of the old St. Louis Mayfield Manufacturing Company's letter-heads that were shipped down here and sometimes stamped "Birmingham" over them. I received Plaintiff's Rebuttal Exhibit #56 from Mr. Mayfield. It is a letter, the envelope of which is addressed to "Charles J. Pogue, St. Louis, Mo., P. O. Box #1238," and having printed thereon "J. C. Mayfield Manufacturing Company, Celery Cola, Kansas City, Mo.," and having stamped over the "Kansas City, Mo.," "Birmingham, Ala." Inside is a letter addressed to "Dear Pogue" and signed by "J. C. Mayfield." Plaintiff's Rebuttal Exhibit #57 consists of six letters each one of which is addressed "to Whom it May Concern." I was going to be up among strangers and so I saw some of these gentlemen and asked them to give me some letters from friends of mine to show to these strangers. That was not during the time I was working for the Celery Cola Company; it was afterwards, in 1910. I received Plaintiff's Rebuttal Exhibit #58 from Mr. Mayfield. The envelope is addressed to "Charles J. Pogue, St. Louis, Mo." is printed "J. C. Mayfield Manufacturing Company, Celery Cola, Kansas City, Mo." and stamped "Birmingham, Ala." [1392] In said envelope is a letter from the J. C. Mayfield Manufacturing Company to A. Busch Glass Company, St. Louis, Missouri, on the "J. C. Mayfield Manufacturing Company" stationery, dated "Birmingham, December 21, 1905." Plaintiff's Rebuttal Exhibit #59 being a letter dated New York, December 13, 1905, evidently addressed to J. C. Mayfield and signed "Britton" is

'(Deposition of Charles J. Pogue.)

a letter that was sent to me by Mr. Mayfield in one of his letters and I think I wrote to Mr. Britton that we didn't know for certain when the case was coming up. We wanted him to come over there to the trial as one of the witnesses. I received Plaintiff's Rebuttal Exhibit #60 from J. C. Mayfield. It is a letter addressed to "Dear Pogue" and is signed "J. C. M." In so far as I know, neither the J. C. Mayfield Manufacturing Company nor the Celery Cola Company either of St. Louis or Birmingham used any different kinds of stationery other than that identified by me except that there was a change of the location both as to the cities and where located in said cities. These letters show, as I have stated, that I was away from there a great deal of the time. No, sir, there is not a single letter that I have examined that has got the name "Koke,"—"K-O-K-E" on it, or in it. That includes those I have identified for this record and those I have examined here, but which have not been put into this record.

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit Nos. 11 to 60, inclusive.)

(Defendant objected to the introduction of each of said exhibits, because irrelevant and immaterial and because they are unsworn hearsay statements and because not proper rebuttal evidence. Objection overruled. Exception.)

(The witness, Charles J. Pogue, having claimed his attendance fee of \$1.50, same was paid him by counsel for the plaintiff and the receipt evidencing such payment was tendered in evidence by counsel

(Deposition of Charles J. Pogue.)

for plaintiff and was duly identified by the Commissioner, bearing the date and signature of the the Commissioner attached thereto.)

(There was no cross-examination of this witness.)

**Deposition of J. T. Stallings, for Plaintiff, In
Rebuttal).**

J. T. STALLINGS.

Direct Examination by Mr. HIRSCH.

I live in Birmingham, Ala. I am official stenographer of Jefferson County, Ala. I am a regular official court stenographer [1393] elected by the Judges of the Courts. I reported a case known as The State versus Melville Rice, heard in the First Division of the Inferior Court of Birmingham, before J. H. Bonner, on August 7, 1907. A witness named J. C. Mayfield was sworn on that trial in the case mentioned. My best recollection is that he was sworn, I wouldn't like to swear positively, it has been a good while ago. Yes, sir; he was cross-examined by counsel for the defendants, Allen & Bell, of Birmingham. Plaintiff's Rebuttal Exhibit #3 is a transcript of Mr. Mayfield's testimony taken at that trial and was prepared by me from my stenographic notes that were taken down at the trial. It is a correct transcript of the record, as reported by me, to the best of my ability, and is complete. I gave a transcript of that record taken from my stenographic notes to Mr. Allen, the attorney for the Defendant. I transcribed the notes myself, is my recollection. I

(Deposition of J. T. Stallings.)

placed this certificate on there at the end of the testimony.

Cross-examination by Mr. LITTLETON.

Plaintiff's Rebuttal Exhibit #3 is a transcript of Mr. Mayfield's testimony only, and is not a complete transcript of all the evidence taken on the trial of that case. The other witnesses examined at that trial, were A. M. W. Parsons, S. T. Mayfield, George H. Bodeker, for the State and Dr. Oscar Hayes, for the Defendant. I have a copy of the complete transcript of all the testimony in my possession. I don't know that I am able to state how that case terminated. I wouldn't like to state positively that the defendant was bound over to the Grand Jury, without referring to the Record.

Redirect Examination by Mr. HIRSCH.

Yes, sir, I was subpoenaed to come here, and I was asked by representatives of the Coca-Cola Company to make a transcript of this record, and I did make it for the Coca-Cola Company. I would be glad to get my per diem fee as a witness. I also made a complete transcript of all the evidence taken in that case for the Coca-Cola Company. The transcript of the entire evidence I charged \$24.00 for, which has not been paid me, and for the certified copy of Mr. Mayfield's testimony I made a charge of \$18.00. I claim my attendance fee of \$1.50 for attendance here, and have no traveling expenses. [1394]

Mr. HIRSCH.—“I present you here the \$42.00 in payment of bill for making up the transcript, Mr. Stallings, and \$1.50, as your witness fee.”

(Deposition of J. T. Stallings.)

(Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibit #4, the transcript of the record made by the witness J. S. Stallings,—it was tendered as a whole and each question and answer was tendered as a separate exhibit by itself, being collectively and separately tendered under the collective Number 5, as an admission on the part of Mayfield and also for the purpose of impeachment.)

Mr. HIRSCH.—I request Mr. Littleton, Counsel for the Defendants in this case, to have Mr. J. C. Mayfield, Sr., here for the purpose of giving him the privilege and opportunity of saying whether this is true or not.

(Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibit #6, the entire transcript of the record in the case of State versus Melville Rice, which includes testimony of all the witnesses examined at said trial, in addition to which each question and answer in said transcript is tendered as an exhibit under the collective number 7, each question and answer tendered as a separate exhibit. Plaintiff also tendered and offered in evidence as Plaintiff's Rebuttal Exhibit #8, the transcript of the Criminal case of the State versus Rice and also as Plaintiff's Rebuttal Exhibit #8, a certified copy of the transcript of the State of Alabama versus Melville Rice, which shows the disposition of the case; and also the transcript of the same case, as Exhibit No. 8, being a certified copy of the findings of the Judge thereon. As Plaintiff's Rebuttal Exhibit #9, the subpoena issued to J. T. Stallings, and receipts

(Deposition of J. T. Stallings.)

showing payment of the two bills for making transcript of the evidence were offered in evidence as Plaintiff's Rebuttal Exhibit #9.)

(Defendants object to the introduction of the document tendered as Plaintiff's Rebuttal Exhibit #3 on the ground; first, that it is not proper Rebuttal evidence; second, that no foundation was laid for the introduction of the same; third, that a complete transcript of the evidence in that case embodying the entire testimony of J. C. Mayfield, has been filed as an exhibit herein and the filing of this additional transcript is just piling up the costs; fourth, that said document is [1395] incompetent, irrelevant and immaterial. The same objection was made to the introduction of Plaintiff's Rebuttal Exhibits Numbers 4 to 8, inclusive. Objections overruled. Exception.)

(Plaintiff here tendered and offered in evidence a printed document,—appears to be a circular,—as Plaintiff's Rebuttal Exhibit #10.)

(Defendants object to the introduction of Plaintiff's Rebuttal Exhibit #10, because it is irrelevant, immaterial and incompetent, second because not properly proved, third because not proper rebuttal evidence, no foundation having been laid for it in the cross-examination of the witness sought to be impeached. Objection overruled. Exception.)

Redirect Examination by Mr. HIRSCH.

I furnished the transcript of the evidence in the case referred to about two weeks ago, I should say. I refer to Plaintiff's Rebuttal Exhibit #6. I fur-

(Deposition of J. T. Stallings.)

nished Plaintiff's Rebuttal Exhibit #4 today, June first. I was first approached about these Exhibits about six weeks or two months ago.

Deposition of David Earl Moody, for Plaintiff (in Rebuttal).

DAVID EARL MOODY.

Direct Examination by Mr. HIRSCH.

I reside at Oneonta, Alabama, which is about 36 miles from here. I have been there six years last Christmas. Before that I lived in Birmingham. I am 45 years of age. I know Mr. J. C. Mayfield, Sr., Mr. Steve Mayfield, J. C. Mayfield, Jr., and Mr. Will Mayfield. I got acquainted with Mr. J. C. Mayfield, Sr., about the latter part of 1903 or the first part of 1904. I bought a third interest in a bottling plant over on Powell Avenue and 20th street in the latter part of 1903 and Mr. Mayfield shortly after that visited that place and I got acquainted with him. B. U. Hopper and John P. Ensley were interested with me in that bottling plant. We called it the Celery-Cola Co. I sold my interest along in the summer of 1904 to a Mr. Keller. Yes, sir, I was at one time a salesman for the Celery-Cola Company. Plaintiff's Rebuttal Exhibit #61 is one of the cards I used,—some just like it. You ask what the Celery-Cola Company manufactured; which one do you have reference to? [1396] The one I worked for after I sold out? Well, they manufactured several brands of drinks over there; namely, Celery-Cola Extracts and syrup and later on a general line of soda-water, ginger-ale

(Deposition of David Earl Moody.)

and vinegar, I believe, and Pepsin-Ola Extract. You ask whether I was familiar with the brands that were sold by that Celery-Cola Company; I was familiar with all the brands I sold, yes, sir. No, sir, I never heard of any drink being manufactured, sold or advertised or any syrup that was called or labeled or branded or stencilized "K-O-K-E." I found a letter-head or two, or a billhead or two, in my files and brought them with me. These two letter-heads marked Plaintiff's Rebuttal Exhibit #62 and #63 are the only ones particularly that I could find. At that time Mr. J. C. Mayfield was President of the Celery-Cola Company for which I worked and one of the other boys was vice-president,—the letter-heads show, I don't know just exactly. I was with the Celery-Cola Company about three years and a little better. I went to work sometime in the summer of 1904 and worked for them on up until the latter part of the year, 1907. Yes, sir, I have seen Plaintiff's Rebuttal Exhibit #64, that's my handwriting. I have a book with me that's similar to that. The Celery-Cola Company, which I was partly interested in, ran a bottling plant and we bottled some of Mr. Mayfield's Celery-Cola and then we put up a general line of soda-water and Ginger-Ale.

Cross-examination by Mr. LITTLETON.

I moved to Birmingham about the first of March, 1901. I ran a general mercantile business. I quit them because it wasn't satisfactory, no money in it. I made a failure of that business. After that I moved to Avondale in 1902 and established a little

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mercantile business over there on the corner of East Lake car line and Spring Street. I had taken sick and my father sold out the business in about six months. After that I moved to Hoff, ten miles from Birmingham, and went in the truck farming business for one year. I moved back to Birmingham here in the fall of 1903 and bought an interest in the Celery-Cola Bottling plant. My recollection is that I paid them a thousand dollars for that interest. I believe I gave the check to Mr. B. U. Hopper. Hopper and Ensley had just bought it, along in the fall, and sold me an interest. At the time I made the trade with them the plant [1397] was over on Powell and 20th St. It was not moved as long I had an interest in it. Later Mr. Mayfield got hold of my interest in it,—I first sold to Mr. Keller and he couldn't pay for it and I had to take it back and then resold it to Mr. Mayfield,—and he went into the bottling business, that is, he took my interest, and finally it was all moved over to Morris Avenue. At the time I was conducting this bottling establishment I bought the Celery-Cola extract from Mr. Mayfield. We bottled a general line of soda-water, strawberry, lemon,—we didn't make any vinegar, Mr. Mayfield had charge of that part of it. After Mr. Mayfield moved over to Morris Avenue the name was changed from the J. C. Mayfield Manufacturing Company to the Celery-Cola Company,—that was while I was traveling for it,—and that is the other Celery-Cola Company I mentioned a while ago. The principal territory I traveled was within a radius of one hundred miles of

(Deposition of David Earl Moody.)

Birmingham. I made one or two trips into Columbus, Mississippi, and one or two into Atlanta. Yes, sir, I was constantly on the road during that time. No, sir, I have never traveled before on the road as a salesman. Yes, sir, I was selling principally the Celery-Cola, that was the kind I was pushing, Celery-Cola, Vinegar, and Cider. I pushed Hop-Ale more than anything else along towards the windup. I made a specialty of the Hop-Ale, and sold more of that than anything. You ask how many brands of vinegar they were making; why, the only kind that was ever given me to sell was the white wine and pure apple vinegar,—two brands of vinegar. You ask if it would surprise me to know that there were four brands of vinegar made by the Company; I never saw but two. They made three brands of cider that I remember of, grape, peach, apple. I do not remember the fourth one, if they had more than three, I don't remember it, possibly they had some cherry, I believe they did have some cherry. In addition to that they sold some Pepsin-Ola Extract,—very little of that,—a good deal of Hop-Ale, Ginger-Ale, and they rectified some stuff over there, sold some rectified stuff over there called "Kidney Cure,"—Gin and Buchu. I couldn't tell you what that "Kidney Cure" was, I wasn't compounding none of it. I know some of the ingredients they put into it, but I don't know what all they did put in. No, sir, I had nothing to do with the manufacture of any of these specialties, [1398] which either the Mayfield Manufacturing Company or the Celery-Cola Com-

(Deposition of David Earl Moody.)

pany were getting out. I was merely a salesman and had nothing to do with the laboratory end of it, I passed through the laboratory occasionally, but not often. I don't know of my own knowledge all the things that were being made there and I don't pretend to testify positively as to everything that was made there. I only know the things given me to sell. And if they made anything else there, any other product under any other name, if it didn't happen to be given me to sell, why, of course, I didn't know about that. No, sir, I don't know anything about the business in which J. C. Mayfield, Sr., or any of the Mayfields was engaged in in Nashville, Tenn., and I know nothing of any business any of them was engaged in in St. Louis. No, I do not know of my own knowledge whether or not J. C. Mayfield, Sr., or any of the other Mayfields made up the Celery-Cola Extract, out of which the Celery-Cola Syrup was prepared, in Birmingham, Nashville, or St. Louis. You ask what class of trade I usually called on in selling vinegar, Hop-Ale and Celery-Cola; in selling the Celery-Cola we called on the bottling trade and also the soda-fountain trade. No, we did not sell Hop-Ale or vinegar to the soda-fountains. When we went to sell the vinegar and the cider we called on the grocery trade and we sold the Hop-Jack principally to the blind tigers,—yes, you might term them blind tigers. You ask if I can recall the names of any of the soda-fountains to which I sold any of the products of any of these companies at any time; well, I sold a half barrel in 1909 to Hearn at Russellville, is my recol-

(Deposition of David Earl Moody.)

lection. Yes, sir; I was working for the Celery-Cola Bottling Company in 1909 at Birmingham, but that was after it had changed hands again. Now, let's see, I remember selling some to the East End Drug Company out here on the Avondale car line about 28th Street. I couldn't tell you the time when the sale was made, but it was sometime when I was traveling. It was not in 1901 because I was not traveling for them then. I couldn't tell if it was in 1902. It was not in 1903. I don't remember whether it was as late as 1909. I think the quantity sold was either a five or ten-gallon keg. A dollar a gallon was the regular price. Sometimes they cut the price. He might have got it for a little less, I couldn't say. [1399] I couldn't tell you the member of the concern to whom I talked when I made the sale. No, sir, I do not remember that the keg was delivered; I don't remember anything about the delivery of it. I just went around and took the order for it. I also sold some to the Bottling Works up here at Atlanta and I sold some to B. T. McGraw Bottling Works at Gadsden,—I don't remember the style of the firm name, but B. T. McGraw was the proprietor at that time. I also sold some to a drug-store at Attala,—I believe the Riskles Drug Company was the style of the firm,—and I sold some to a drug-store at Piedmont,—I can think of several of them if you can give me time to study them up, but I can't recall them right off the reel. You ask if it isn't a fact that my duties with this concern we were talking about only required me to sell to bot-

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tlers and grocery stores and things of that kind and that Steve Mayfield was the Company's salesman who called mostly on the soda-fountain trade; when I made the trade with Mr. Mayfield, my duties with regard to that wasn't specified,—just who I should call on, either soda-fountain or bottling works,—just where I could find that kind of business. I called on them all where I went, where I thought I would get any business. You ask how many Cola drinks there were on the market in Birmingham at the time I was in the bottling business, with the Celery-Cola Bottling Company; why, at that time Mr. Peck was manufacturing a drink over here which he called "Rye-Ola" and there was a "Wise-Ola" Bottling Plant,—those two are the only ones that I remember at that time.

(Plaintiff objects to the question and answer as being improper form of cross-examination and because the direct examination did not cover this subject and because the same is immaterial and brings out matter that was not brought out on direct examination. Objection overruled. Exception.)

Yes, sir; I remember about "Ala-Cola," also, and there was one at Bessemer,—I had forgotten about that. (Same objection for plaintiff. Overruled. Exception.) No, sir; I do not know, and did not know Hubert (Houppert). I have met Mr. Smyly. You ask if I ever heard of a product in Birmingham called "Dope"; why, later on I did,—not right at the time I was working over there, but later on I heard they were [1400] manufacturing stuff

(Deposition of David Earl Moody.)

called "Dope." (Same objection by plaintiff. Overruled. Exception.) No, sir; I do not know how many Cola drinks there are on the market today in Birmingham. (Same objection by plaintiff. Overruled. Exception.) You ask if I am connected with any Cola drink concern now; I have been making a drink I call "Queen-Ola," up until last Fall. This wave of prosperity just about knocked me out. (Same objection by plaintiff. Overruled. Exception.) I have been making it some three or four years. (Same objection by plaintiff. Overruled. Exception.) Yes, sir; that is a syrup for making a soda-fountain beverage. (Same objection by plaintiff. Overruled. Exception.) You ask if I sell it to the soda-fountain trade as well as to bottlers; I have sold it to a few bottlers. (Same objection by plaintiff. Overruled. Exception.) I don't call it a cola beverage, I call it "Queen-Ola." I don't know, sir, that it belongs to that same general color. I know the color of the drink but it's a peculiar color of its own. I color it artificially with caramel. (Same objection by plaintiff. Overruled. Exception.) You ask if it is a light or a dark color; I call it tolerably dark. (Same objection by plaintiff. Overruled. Exception.) It is darker, some, than "Coca-Cola." No, sir; it is not near the same color, it's darker. (Same objection by plaintiff. Overruled. Exception.) No, sir; it isn't jet black, but it's darker than "Coca-Cola." (Same objection by plaintiff. Overruled. Exception.) I don't bottle it and never did. I sold it in the syrup form and I

(Deposition of David Earl Moody.)

believe I sold it to about two or three bottlers and possibly that many soda-fountains. (Same objection by plaintiff. Overruled. Exception.) I am not selling it at all now, I am out of business. No, sir; I did not sell it to any of the bottlers in Birmingham. (Same objection by plaintiff. Overruled. Exception.) I have seen it in bottles at the plant where it is bottled. (Same objection by plaintiff. Overruled. Exception.) Some of the bottles were green and some were flint white bottles,—common cap soda-water bottles, seven or eight-ounce bottle. (Same objection by plaintiff. Overruled. Exception.) It was the shape of the regular soda-water bottle. (Same objection by plaintiff. Overruled. Exception.) You ask how its general shape, size and general design compared with the size, shape and general design of the Coca-Cola bottle; [1401] Mr. Bodeker saw me about a month or more ago. I made a statement to him then about practically what my testimony would be in this case. No one else saw me with reference to this testimony. I couldn't say whether or not my drink has ever been substituted for any of these other drinks. (Same objection by plaintiff. Overruled. Exception.) I got the formula for my drink at various places,—picked up a little here and yonder. (Same objection by plaintiff. Overruled. Exception.) No, sir, I did not get any information with reference to it while I was with the Celery-Cola Company. (Same objection by plaintiff. Overruled. Exception.) I bought part of the formula from a party. (Same objection by plain-

(Deposition of David Earl Moody.)

tiff. Overruled. Exception.) You ask who I bought it from; well, it's a personal matter, I don't know that it concerns this business. (Same objection by plaintiff. Overruled. Exception.) You say you would like to have me answer the question and Mr. Hirsch advises me that I don't have to answer it if I don't want to, and objects to it on the same ground as the previous objections; it's a personal matter and, unless I am obliged to answer it, I don't care to. I have no reason for declining to answer, only it's my personal affairs and I don't think it concerns anybody else outside of myself. Of course, if the Court requires it I will answer it, but it's a personal matter and I don't care to answer. Nobody was associated with me in my "Queen-Ola" business. No, sir; I am neither a chemist nor a druggist, nor am I acquainted with the handling of drugs or products of that sort. You ask if I said that I thought part of my product and invented the other part; I bought all of it. No, sir, I didn't buy all of my formula,—you asked if I bought any of my product. I bought part of my formula and invented the other part. (Same objection by plaintiff. Overruled. Exception.) I bought all of the ingredients that it is made of. (Same objection by plaintiff. Overruled. Exception.) No, sir; I do not buy my extract already made in extract form. I buy the essential oils and mix it myself. I make my own extracts according to my formula. (Same objection by plaintiff. Overruled. Exception.)

(Deposition of David Earl Moody.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits #61 to #64, inclusive.)
[1402]

Deposition of B. U. Hopper, for Plaintiff (in Rebuttal).

B. U. HOPPER.

Direct Examination by Mr. HIRSCH.

I live at 606 North 24th St., Birmingham, Ala. I am a clerk in the postoffice here in Birmingham and have been such for three years. Yes, sir, I was acquainted with J. C. Mayfield and the business of the Mayfield Manufacturing Company and of the Celery-Cola Co. I knew them somewhere from the early spring of 1904 for a year and a half, or about, two years. I worked for one of these companies a short while; I was, though, in the building with them. I had a bottling works in the building,—rented a part of the building from Mr. Mayfield and ran a bottling works which he had no part in, but I was in the same building with them. The concern I worked for was the J. C. Mayfield Manufacturing Company, for which I worked about three months, I think. I was shipping clerk and had charge of getting up the orders, etc.,—seeing to shipping them out and receiving stuff and checking it off, etc. Yes, sir, I was familiar with the products manufactured by the J. C. Mayfield Manufacturing Co. I don't know just whether I could tell all the soft drinks they manufactured or not; they manufactured a lot of soda-water extracts and syrups that they sold. I can

(Deposition of B. U. Hopper.)

name some of them, though. They had "Celery-Cola" and "Pepsin-Ola" and then a lot of lemon, orange, strawberry, vanilla, and such extracts as that, used at soda-fountains. You ask if I ever heard of the Mayfield Manufacturing Company or the Celery-Cola Company making a drink or syrup called "Koke,"—"K-O-K-E"; not while I was with them, I don't know of any and never heard of any. You ask if I ever saw any bottles, jugs, kegs or barrels shipped out, or any syrups shipped out, or if I ever saw any advertising of any kind or character that had on them "K-O-K-E," shipped out of that place; I don't remember of any at all. I remember several of those who worked there while I was there. There was a Mr. Pogue and a Mr. Moody; then there is others, but I don't know the names,—I know the men when I see them, but I don't know their names. I think there was a young fellow named Trent that worked there for awhile.

Cross-examination by Mr. LITTLETON.

If Mr. Mayfield made any extract or syrup called "Koke" it has been so long ago that I don't remember it. [1403] Of course he could have made it and I couldn't say that he didn't make it, but I don't remember him making it. I didn't see any and I don't remember of any. He was making a number of these extracts, but "Celery-Cola" was the thing he was pushing. However, along with that he was making a lot of little extracts and syrups that he was selling in small quantities and there was quite a number of them. I couldn't say that I could name them

(Deposition of B. U. Hopper.)

all, at all. It has been several years ago, and, not knowing that I would ever be asked to even think of these things again, of course, I wouldn't be able to.

Redirect Examination by Mr. HIRSCH.

No, sir, I do not remember having labeled or bottled anything and do not remember seeing anything that was labeled, or that had "K-O-K-E" on it.

Deposition of W. M. Smith, for Plaintiff (in Rebuttal).

W. M. SMITH.

Direct Examination by Mr. HIRSCH.

I am 24 years old and reside at Powderly, a suburb of Birmingham. I am an automobile mechanic. Yes, sir; I worked for the Mayfield Manufacturing Company,—I don't exactly know the exact date,—but it was along about 1902 or 1903, sometime along there, up until about 1906 or 1907. When I first went to work with that concern I commenced washing bottles at first and then they put me to labeling and then after I got on to bottling they put me to bottling and I bottled on up to the time I quit. I also mixed some syrup. I packed the bottles and shipped cases. The Mayfield Manufacturing Company was engaged in Celery-Cola, Pepsin-Ola, Hop-Ale, Cider and Vinegar and stuff like that. They were first located on Powell Avenue and 20th Street and from there they went to 2114-2116 Morris Avenue. They shipped some of the bottles in barrels and then they shipped small shipping cases with four dozen bottles at times and at other times with eight dozen small

(Deposition of W. M. Smith.)

bottles to the case. They also shipped out syrup in five and ten-gallon kegs and in half-gallon and one-gallon and two-gallon jugs. No, sir, while I was working for the Mayfield Manufacturing Company they did not ever manufacture, sell or offer for sale any product, or have any barrels, kegs, bottles, jugs or anything, with a label, or anything, on it, with the name of "Koke,"—"K-O-K-E." No, sir; there was never a product, to my knowledge, made with "K-O-K-E" on it. [1404] No, sir, there was never a product around there with "K-O-K-E" on it, nor was there ever any advertising around there with that on it. Yes, sir, on March 4th or 5th of this year, Mr. J. C. Mayfield, Sr., stopped me on 3d Avenue and 20th Street, Birmingham, and asked me to wait a minute. He called me off to one side and said: "We are having court up here at the Tutwiler Hotel. I want you to come up there. Maybe you can do me some good. We are bottling a drink called 'Koke' and I know you have seen the stuff that we bottle. All you have to do is to go up there and tell them we have been bottling that stuff." He handed me a little slip with "Koke" printed on it. After that he asked me what I was doing then, and I told him I was in the automobile business, but was not working just then. "Well," he said, "Maybe after this case is over, perhaps I could give you a job in Louisiana in the bottling plant down there." He took down my address and gave me that little slip.

(Defendants object to the question and answer and move to strike the same because no foundation was

(Deposition of W. M. Smith.)

laid for such rebuttal testimony in the cross-examination of the witness J. C. Mayfield. Overruled. Exception.)

The little slip marked Plaintiff's Rebuttal Exhibit #66 is a slip just like the one that Mr. Mayfield handed me, but I didn't notice about the number of it. (Same objection by defendant. Overruled. Exception.) I told Mr. Mayfield I didn't know whether I could go down there or not, but if I could do him any good I would like to if there was any possible chance; I didn't know whether I could or not. I remember the names of a few of the people who worked for the Mayfield Manufacturing Company while I was there; namely, Mr. Garrett and Homer Brewery, the latter a colored boy who worked in the shop washing bottles at that time, and James Dickson, Howard Trent and John Bevell. No, sir, I have no recollection of anything like Plaintiff's Rebuttal Exhibit #66 having been used at the Mayfield manufacturing Company while I was there. I done most of the labeling.

Cross-examination by Mr. LITTLETON.

Mr. Pogue was with Mr. J. C. Mayfield when he had this conversation with me above referred to. I don't recollect whether Mr. [1405] Steve Mayfield was with him or not, but I don't think he was. You ask if Mr. Norman was with him; I don't know, sir. It has been so long ago I don't remember whether or not any other gentleman was with him besides that. You say I *can't* remember back in 1905 and 1906, but that I can't remember back two months

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ago; well, I expect I could. You ask me to think right hard; well, stopping on the street where there were so many people there might have been somebody there who wasn't with him at all. You ask if it is a fact that this extraordinary proposition he made to give me a job in New Orleans didn't impress me at all, if it was just a casual thing that occurred every day and didn't impress my mind in the least, and you again ask if I hesitate to answer the question; well, I never gave it a thought when he was talking to me, I didn't know whether there was a chance for me to get a job or not. I wasn't particular about going to New Orleans. No, I didn't tell Mr. Hirsch on direct examination that I wanted to go to New Orleans, but I would go there if there was a possible chance of me getting a position. No, sir, I was not dissatisfied with the position I had. I wanted to change and go to New Orleans because I had kin people down there. No, that prospect of getting a job and going down there with my kin people did not impress my mind very much, I don't think. ("XQ. 40.) Now, I will ask you, Mr. Witness, if Mr. Mayfield didn't ask you if you remembered his making "Koke" in Birmingham in 1904, 1905, and 1906, and if you didn't make the statement in the presence of Mr. J. C. Mayfield and W. F. Norman, that you did remember that he made "Koke," and if you didn't go on and describe the label with which the product was labeled?" "(A.) Mr. Mayfield asked me to say that." "(XQ. 41.) On the contrary, didn't he ask you whether or not he had

(Deposition of W. M. Smith.)

made 'Koke'? "(A.) He asked me, yes, sir." "(XQ. 42.) If you remember his making 'Koke.' " "(A.) He asked me did I remember it and I told him yes?" "(XQ. 43.) And you told him yes?" "(A.) Yes." "(XQ. 44.) And I now ask you whether or not you didn't come into this hotel then, the Tutwiler Hotel, in the presence of J. C. Mayfield and W. F. Norman and me, A. B. Littleton, and make the statement to me that you remembered his making 'Koke' and labeling it 'Koke' and that you washed his 'Koke' bottles, and that your recollection on that was clear, and if you didn't describe the 'Koke' label to me?" "(A.) Yes, sir." [1406] "(X. 45. That statement you now say is untrue?" "(A.) I didn't say it was untrue, I tell you I did say that." "(XQ. 46.) You told me that was true, that you remembered that at that time?" "(A.) Yes, sir." ("XQ. 47.) Well, was it a fact, did you remember it, or did you not remember it?" "(A.) I did remember it. I don't remember him making 'Koke,' but I remember saying he made 'Koke.' Yes, sir, I deliberately told you a falsehood when you asked me the question, and I confess publicly before the Court that I falsified on that occasion. You ask who first saw me with reference to my testifying in this case on behalf of the Coca-Cola Company; why, a Mr. Harrison left his card for me at the Highland Garage to come to the Florence Hotel, Saturday a week ago. I don't know who he is." "(XQ. 55.) Is he one of these numerous 'Coca-Cola' detectives floating around town?"

Mr. HIRSCH.—"I object to that; there is no evi-

(Deposition of W. M. Smith.)

dence that there is any 'Coca-Cola' detectives floating around town."

I didn't go down there and didn't get a chance to see him. The next person who saw me with reference to my testimony was H. B. Pierce, who is sitting over here. He saw me yesterday. I didn't say anything to him at all. He just made himself acquainted and told me to be back up here at eleven o'clock to-day. I made a statement to Mr. George Bodeker, who is sitting here, about three weeks ago, with reference to what I have testified on the stand to-day. I don't exactly know how he knew that I knew all this; he just left a call at the garage, requesting me to come down to his office in the Brown-Marx Building, saying he wanted to see me.

Redirect Examination by Mr. HIRSCH.

You say that if I have any statement to make as to why I made the statement, which I now say is false, to Mr. Littleton and the gentleman he has named, I can go ahead and state it; well, I simply made the statement because I was out of a position and I thought may be there was a chance for me getting a position,—I had tried to get a position in town and there wasn't a possible chance, and Mr. Mayfield told me there might be a chance of his giving me a position in New Orleans if I would go up there and help him out in this case, and that's the reason I done it.

Recross-examination by Mr. LITTLETON.

You ask if I would sell my honor and my integrity for a mess [1407] of pottage; I don't know ex-

(Deposition of W. M. Smith.)

actly whether I would or not. You ask if I didn't state to you on cross-examination that I had a job here at the time, and that I was well satisfied with it; I had a job, but the job wasn't paying me enough money. You ask if I didn't just this minute tell Mr. Hirsch that I was out of a job and looking for one; yes, I was out of a job because the job I had a few days before that, I wasn't making enough money. You ask if I didn't just make the statement to you that the job I had was entirely satisfactory and that I had no reason for making a change except that the fact of my kin people living in New Orleans. You ask if I didn't just make that statement; sure I did, I said I had kin folks in New Orleans. You ask if I now make the statement that the inducement which impelled me to sacrifice my honor and integrity and to come up here and deliberately falsify, was to get down in New Orleans to my kin people,—if that's the price I was willing to pay for selling my honor and integrity; no, not exactly; I wasn't undertaking to sell my honor. No, I don't consider it dishonorable or a sign of a lack of integrity to deliberately falsify. You can get a man bum-fuddled so that he will say anything before you can bat your eye,—that's why I said it, trying to get me cross-questioned,—that's the reason I said it. You ask me which then is the truth, the fact that I had a job or didn't have one; I had a job with the Jitney Motor Car Company. You ask which is the truth, that I was satisfied or not satisfied with the job; I wasn't satisfied with the

(Deposition of W. M. Smith.)

money I was getting at my trade of automobile mechanic. The job was satisfactory, all except I wasn't getting enough salary. You ask which one of the statements is true, that I wanted to go to New Orleans to be with my kin people or that I wanted to go there on account of getting a better job; I wanted to get a better job. You ask if I repeat the statement I made that I wanted to go to my kin people; I haven't seen them since I was a baby and don't know anything about them. All I know is they are down there and that's all. Yes, sir; I would like to go down there to see these people who are utter strangers to me and whom I have never seen in my life and that's the impelling inducement that made me want to leave a fine city like Birmingham to go down to a place like New Orleans. I am asked by Mr. Hirsch if I claim my attendance fee and am advised [1408] that I am allowed \$1.50 for attendance; yes, sir; I claim it.

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibit Nos. 66 and 67, the latter being the receipt from the witness for the witness fee of \$1.50 paid to him by Counsel for Plaintiff.)

Deposition of J. T. Ensley, for Plaintiff (In Rebuttal).

J. T. ENSLEY.

Direct Examination by Mr. HIRSCH.

I reside at 606 N. 24th St., Birmingham, Ala. I am in the insurance business at 401-3 Woodward

(Deposition of J. T. Ensley.)

Bldg. I am 28 years old. I know Mr. J. C. Mayfield, Sr., and have known him about 16 years, I guess. Yes, sir; I was connected with him in a business way for, I think, about five years. When I first knew him his business was located on Morris Ave. and at 1526 So. 20th St. I don't remember the number on Morris Ave. I worked for the Mayfield Manufacturing Company for quite a while. I am not sure about dates, but I think it was either 1900 or 1901 that I began working for them, and I was connected with them until about 1906, I think. My duties consisted of first one thing and then another. I started out in knee-pants, I believe, washing bottles, and I was on the wagon part of the time. I was not there in any other capacity. They were in the bottling business, syrup business, manufacturing syrups of different kinds. They also sold different kinds of wine and "Hop-Ale." You ask what kind of syrups they sold; well a number of syrups that they put on the market. They put out all the popular flavors, I believe, such as lemon extracts and syrups, vanilla, strawberry and all the soda-water drinks and "Vig-O,"—a specialty drink,—"Pepsin-Ola," "Peppo-Ade," Celery-Cola,"—that's all that I remember of. Part of the time I was in a position whereby I became familiar with the labels they put on barrels, bottles, jugs and kegs, and part of the time I was not. You ask if during the time I can remember I ever knew of them manufacturing any drink down there, or having any labels at their place of business with the word

(Deposition of J. T. Ensley.)

“Koke,”—“KO-K-E” on it; I don’t remember it, sir. No, sir; I never did see any stickers or labels or anything with the word “Koke” on it. The first time I ever heard of Mr. Mayfield and his associates manufacturing a drink called “Koke” was sometime the latter part of 1914, I think. I met his son, Mr. Steve Mayfield, one day and he was showing me a letter from his father,—I just [1409] noted the letter-head. Yes, sir; I was at one time connected with the Celery-Cola Company, but I never heard of them having any “Koke.” The instance I have just related is the first I ever heard of “K-O-K-E.” The question as to who else was working with the Celery-Cola Company or J. C. Mayfield at the time I was there will be hard to answer. I believe Mr. Moody, Mr. Pogue,—I don’t know whether he was connected with the Company or not; he was around there quite a good deal, and I think he was, but I couldn’t say for certain,—Mr. Benjamin I believe, for a while, Professor Ellis,—that’s all I recall at the present time.

Cross-examination by Mr. LITTLETON.

No, sir; I didn’t say that the first time I ever heard the word “Koke” was in 1914. I have heard that word since I was a kid, people would go up to the counter and call for “Koke” and “make it a dope” and such as that. I have heard the word before. You ask if I have named all the things Mayfield Company was making and selling; I believe that they had some kind of bitters that they put out,—but that wasn’t in the soft drink line, but I don’t

(Deposition of J. T. Ensley.)

remember the name of it. Besides these soda-water drinks, they were making and selling wines and vinegar. Yes, sir; I was in the shipping department a while labeling the products, and, also, washed bottles at the bottling machine, and was on the wagon, and did various things around the place. Yes, sir; I labeled his vinegar casks. I remember a few of the brands of vinegar he was putting out. "Elko County Vinegar," I believe, was the leader. No, sir; I can't think of any other brands. He had other brands of vinegar, but I don't remember them. They didn't impress my mind. It has been five or six years since then and I haven't thought about it since. Yes, sir; he was also making cider, and I guess I can call over the number of different brands of cider which he was putting out; namely, Grape, Peach, and I believe he put out a Pineapple flavor cider, Cherry, Blackberry, I believe, that's all I remember. I couldn't say whether he put out five or only four flavors; he might have had other flavors, but those are the ones I remember. You say that I have named five and that you want to be certain whether he put out four or five; well, let me go over them again. He put out Grape, Peach, Pineapple, Blackberry and Port Wine. You say that isn't cider and that you are speaking of cider. [1410] Well, we called this cider according to where we shipped it,—if it was in Mississippi we called it cider, but if it was in Alabama we called it wine, it all depended upon where we sent it. I don't remember whether there were any other brands

(Deposition of J. T. Ensley.)

besides these. I am sure there were other brands of vinegar than the "Elko County" vinegar. Yes, sir; he was making a number of extracts, and I didn't pretend to remember all the extracts he was making, I couldn't call all the names. If he made any "Koke" syrup, or "Koke" extract, it has now passed out of my memory. It is possible he could have made it without my knowing about it, but I don't now remember. They had their extract business away from here part of the time, and manufactured, I believe, in St. Louis and Nashville, and I wasn't familiar with what they were doing there. They shipped extracts from those cities to Birmingham. They had a branch house in St. Louis, I believe, and probably in Nashville. As a matter of fact, Mr. J. C. Mayfield, Sr., made up his extracts most any place he was at,—get him a paddle and barrel and mixed up his extracts. He would go about the country and wherever he happened to be he would make up a batch of it, and, as I say, in St. Louis, Birmingham and Nashville he made extracts. Sometimes he would be in Birmingham, sometimes in St. Louis, sometimes in Nashville and sometimes somewhere else. When he was in Birmingham he mixed his extracts upstairs. I have called over all I remember being mixed. It has been so long ago that if there were any others they have passed out of my mind, that's as near as I can remember. Mr. Hirsch asks me if I was subpoenaed in this case and if I claim my attendance fee, to both of which questions I

(Deposition of J. T. Ensley.)

answer, yes. (Having claimed his attendance fee, \$1.50 was paid the witness, J. T. Ensley, by counsel for the plaintiff.

Deposition of B. M. Allen, for Plaintiff (in Rebuttal).

B. M. ALLEN.

Direct Examination by Mr. HIRSCH.

I am attorney-at-law and live in Birmingham, Ala. I have been a practicing attorney for about thirty years, I guess. Yes, sir; I remember a case in 1907, tried before Judge Bonner,—at that time it was called the Inferior Court,—entitled The State versus Melville Rice. [1411] I was attorney for the defendant in that case. It's a long time to remember, but I conducted the cross-examination of the witness who appeared on behalf of the State any my recollection is that I tried the case unassisted by other counsel. I can only give my recollection from the general, probable situation; I couldn't state specifically from actual memory, of course, so far back. My acquaintance with the Mayfields was limited. I knew the elder Mr. Mayfield, I don't know whether his name was J. C. Mayfield or not,—then he had a son, and there was also a lady who had formerly been Mrs. Mayfield, who was interested in the case,—I don't know that I could testify to the names or initials of the parties except in connection with identification that way. I know Mr. Stallings, the Court Stenographer, very well. My recollection is that he took down the testimony in

(Deposition of B. M. Allen.)

that case. I have a transcript of that testimony in my files, I know it is one of our file records. You ask me to look at Plaintiff's Rebuttal Exhibit #6 and see if I recollect that; well now, of course, I couldn't identify this particular paper, but I know that the general conditions are correct; I know the parties are correctly stated, and that I was the attorney for the defendant and I remember generally what was testified to and we had a copy of the testimony. Now, of course, I say I haven't read that particular copy there. I have a copy of the testimony in my office. I haven't it with me. I remember the case quite distinctly. I remember what the man was charged with, I think, and, what the general line of inquiry was,—he was charged with stealing some syrup, I believe, something of that sort, also some supposedly wonderfully valuable formulas,—I know I tried to find out what they were and the Court wouldn't let me.

Deposition of Thomas Dickson, for Plaintiff (in Rebuttal).

THOMAS DICKSON (Col.)

Direct Examination by Mr. HIRSCH.

I live at 2126 Sixth Alley, North Birmingham, Ala. Yes, sir; I worked for the Mayfield Manufacturing Company, but I don't know, Cap, how long it was; I worked for them a long time, about five or six years. I reckon; I just don't know how long, but I worked for them a long time. Yes, sir, I know about when I started to work for them,—well, I

(Deposition of Thomas Dickson.)

know where they were when I started. They were on Powell Avenue and 20th St. It ought to be about the year 1902 or 1903, somewhere about [1412] that time. I first started driving a wagon, washing bottles and one thing and another; later on they found out that I was a chemist and they made me do a whole lot of things around there. You ask if I ever mixed any drinks around there; yes, sir; something like the syrups, and one thing and another. They were making "Celery-Cola," and "Pepsin-Ola," and soda water and such things as that. Yes, sir; I mean by that strawberry and lemon and peach. No, sir; they didn't make the cider, but they handled it, and, also, handled "Hop-Ale." You ask if I ever knew of any drink around there that they bought, or made, or sold, or handled, or labeled, or any advertising matter, or anything around there that had the name "Koke," "K-O-K-E," on it; I don't remember that, Cap, I never saw that, I can't remember that.

Cross-examination by Mr. LITTLETON.

Yes, sir; I am a negro. Yes, sir; I can read and write. I went to school at Atlanta University in Atlanta, Ga. In addition to these things I have testified about, they also made some bitters around there,—“Vig-O” was one of the names, Cap. One of the bitters was called “Vig-O.” You ask what else; let's see,—well, I disremember the others. That's all I know of. No, sir; I don't remember anything about the cider, they didn't make the cider, you know, Cap. You say what else they were selling

(Deposition of Thomas Dickson.)

besides what I have mentioned; well, there is orange phosphate, something like that, they would make that, that's a cider but they called phosphate,—it isn't a cider, either, because it doesn't make you drunk, either, unless it sours; it's got to stand some-time before it makes you drunk, something like a year before it makes you drunk. Yes, sir, they were selling vinegar, but I couldn't say how many brands they sold. No, sir; I don't remember the names of any of the brands of vinegar, I just know it was vinegar. Yes, sir; I have forgotten the names of the brands of vinegar they were selling. I didn't pay much attention to the vinegar, I just paid attention to my mind on the work. I always keep my mind on my work as best I can, you know. Yes, sir; my work included everything around there, mighty nigh, because I was kind of manager of the colored department,—all the niggers. I was the boss of the negroes and would be after all the negroes who handled the vinegar. [1413] I certainly did see that they put the proper labels on it, but I can't remember the name of a single brand of vinegar he put out. I tell you how it was, I have been out of business so long,—I have got a good trade, but I can't get no money for it in this town and I had to make a living and so I got out and went to work to make a living and it has passed out of my kind. You ask if the vinegar was not one of the biggest parts of the business while I was there. Vinegar was selling right on, but I can't remember the vinegar because I never paid much attention to the vine-

(Deposition of Thomas Dickson.)

gar, but I knew the names, the different names of the vinegar, all right. I can't remember the names of the ciders they were selling,—nothing but the phosphate, something like that. No, sir; prospbate is not a cider, it's phosphate. As I have before told you, it isn't a cider at all until it stands something like twelve months. You say that I don't seem to be able to remember the names of the different brands of vinegar and you ask me how many different brands of vinegar he sold; no, sir, I don't,—cherry and blackberry,—just any kind of names people wanted. No, sir; I don't remember any pineapple cider either, I don't remember making that. Sure, lots of things were made there that I don't know about and don't remember about; I will tell you, Cap, I can't remember all that, I have been doing other kind of work. After I couldn't get paid for my kind of work I just naturally gave it up. You ask if my memory now isn't very hazy indeed as to the different brands of drinks that were put out; well, I just naturally have done forgotten about it,—just trying to make a living, that's all. You ask if this "Koke" which he was making there has passed out of my mind, too, like the cider and the vinegar which I handled; well, I don't remember that at all. You ask if I remember the barrels that he put that extract in when he shipped it out; I don't remember the "Koke," Cap, I am going to tell you the truth, I don't remember the "Koke." No, sir, I don't remember the brands of the vinegar, or the cider, either, I sure don't. I just know we shipped

(Deposition of Thomas Dickson.)

vinegar. There was white-wine vinegar, and apple vinegar and all like that, and cider vinegar, these are the three I know of; but whether we shipped them all I don't know, I disremember. Yes, sir; I remember what "Celery-Cola" was; it was what you might call the extract, you know,—that was the fountain syrup. [1414] You ask if it was a syrup or an extract; well, it goes out in syrup, you know, extract in the house. Whenever it went out they sold it in syrup, you know. Yes, sir; they were doing some bottling when I was there, but I don't know the number of different brands of Cola drinks Mr. Mayfield was making and selling at the time. I can't remember whether he was selling two or three brands or not because there were different soda-waters, you know. However, he did sell two or three of these Cola drinks, "Pepsin-Ola" and "Celery-Cola." No, sir; "Pepsin-Ola" was not a Cola extract, that was "Pepsin-Ola." You ask whereabouts in the building I worked; I worked upstairs on Powell Avenue and 20th Street and also at 2114 Morris Avenue. You ask if any business was going on over there, too; not more than a place where they had to do the mixing, you know,—above where anybody had any business, you know. I was all over the building because I was negro boss, to see that the rest of the negroes worked, and I worked myself, Cap. I did the mixing part of the time upstairs on Morris Ave. The cider was already mixed when it came there, but I made the phosphate myself. I couldn't say exactly what year it was that I

(Deposition of Thomas Dickson.)

went to work for them, but I started on Powell Avenue and 20th Street. No, sir; I did not first go to work on Powell Avenue for Ensley and Hopper. I went to work for Mr. Mayfield. I never has worked for Ensley and Hopper. Of course, they owned the bottling department at that time.

“Q. (By Mr. HIRSCH.) You claim your attendance fee of \$1.50?”

“A. Yes, sir.”

(The witness, Thomas Dickson, having claimed his attendance fee, \$1.50, was paid him by counsel for the plaintiff.)

Deposition of Homer Brewer, for Plaintiff (In Rebuttal).

HOMER BREWER (Col.)

Direct Examination by Mr. HIRSCH.

I live at 1631 Avenue K., Birmingham, Ala. I will be 30 years old the 10th day of September. At the present time I am employed by the Coca-Cola Bottling Company of Birmingham. Yes, sir; about June, 1906, I was employed by the Celery-Cola Company here in Birmingham. I stayed with them six or seven months. No, sir; I never heard, during that six or seven months while I was over there, of any product by the name of “Koke.” No, sir; as far as I know they were not making any product by the name of “K-O-K-E.” [1415] No, sir; I did not see any labels or advertising matter with the name “K-O-K-E” on it while I was over there.

(Deposition of Homer Brewer.)

Cross-examination by Mr. LITTLETON.

I have been employed by the Coca-Cola Company since June, 1909. I haven't been talking to anybody about my testimony in this case. No, sir; I never breathed it to a living soul before I entered this room just now. Nobody on earth knew what I was going to testify to until I came into this room and took that chair. No, sir; Mr. Bodeker over there never did see me about it, nor did Mr. Pierce. Nobody at the Coca-Cola Bottling plant ever talked to me about my testimony. Yes, sir; I was in the other room just now. You ask if Mr. Pierce was in there, too; I don't know Mr. Pierce. No, sir; I was not talking about my testimony in this case in the other room. I don't know, sir, how they knew what I knew about it. You ask if they just dreamed it; I don't know, sir, how they knew it. You ask if I suppose that the attorneys for the Coca-Cola Company would bring me in here and put me on the stand without knowing what I was going to testify to; he knew I worked for the Celery-Cola Company. You ask how he knew that if I didn't tell it to anybody; well, Mr. Gresham asked had I ever worked for the Celery-Cola Company and I told him then that I had worked for the Celery-Cola Company, that's all he asked me. Mr. Gresham is with the Birmingham Coca-Cola Company. He asked me that about five months ago. I washed bottles when I was at the Celery-Cola Company. You ask how many bottle washers they had there, saying that you had five or six here to-day; they didn't have but one

(Deposition of Homer Brewer.)

at the time I was there. Yes, sir, Jim Dickson was there when I was there. No, sir; he was not washing bottles then. Yes, sir; Mr. Will Smith was there when I was there and he was washing bottles part of the time. We all done different work, you know, all of us. I worked downstairs. The place of business was on Morris Avenue. That's all I did around there, just washed bottles, and I don't know anything else that was going on there at all except the bottles I would wash. Yes, sir; I can read and write; yes, sir; I am a negro.

Deposition of Tom Anderson, for Plaintiff (In Rebuttal).

TOM ANDERSON (Col.) [1416]

Direct Examination by Mr. HIRSCH.

I am 54 years old and live at Rosedale, a suburb of Birmingham. I am working for the Southern Railroad Company, delivering freight. Yes, sir; I knew Mr. J. C. Mayfield and I once worked for the Schooler Vinegar and Cider Company. I was there when Mr. Mayfield bought them out. I worked for Mr. Mayfield something like three or four weeks after that. Yes, sir; I also worked for the Celery-Cola Bottling Company. They bottled "Celery-Cola," Ginger Ale, Cream Soda Waters, Lemon Soda Waters, and Orange Soda Waters, and Strawberry,—such as that. I worked for the Celery-Cola Bottling Company something like three years. No, sir, I never heard, during the time I was working there, of any product manufactured, made or sold by

(Deposition of Tom Anderson.)

the name of "Koke," nor did I ever see any labels or anything with "K-O-K-E" on it. I didn't see none, either, while I was with Mr. J. C. Mayfield and while I was with the Celery-Cola Bottling Co. If it was there I didn't see it, they kept it away from me.

Cross-examination by Mr. LITTLETON.

I first worked with the Schooler Vinegar Company and then with the Celery-Cola Bottling Company. I never did work for the Celery-Cola Company. You ask if those are the only two concerns I worked for; I worked for Mr. Mayfield something like three or four weeks before I worked for the Celery-Cola Bottling Company. After he got in possession of the Schooler Vinegar Company, I worked for him until he went and cut my wages and I couldn't stand for that so I went right downstairs and went to work for the Celery-Cola Bottling Company. You ask if I felt that he didn't treat me right at that time; I know it wasn't right. No, sir; I never held it against him ever since. He could pay me what he pleased and I wasn't obliged to work for him, was the way I looked at it. I said I worked for Mr. Mayfield individually something like three or four weeks and then I worked for the Celery-Cola Bottling Company between two and three years. For the last-named concern I mixed their drinks and bottled them, both. They had only one person there doing the mixing which was me. I don't remember the year in which I was doing the mixing, I am afraid to say, I might be wrong. I never kept no tab of it because I thought the thing [1417] was

(Deposition of Tom Anderson.)

lover and past, and I never paid no attention to it. The concern for which I mixed drinks was the Celery-Cola Bottling Co. I made the syrup myself that was used by the Celery-Cola Bottling Company. The extracts were made by someone else and I had to mix the extracts with the syrups to make up the drinks they wanted. I did the mixing for two or three years, something like that. The place where I mixed these drinks was 1520 South 20th St. and Powell Ave. I mixed it in the rear end of the building on the ground floor,—they were once on the second floor and they moved to the ground floor and there is where I last bottled it on the ground floor. You ask if I remember distinctly the products which the Schooler Vinegar Company, J. C. Mayfield and the Celery-Cola Bottling Company were handling and selling; the Schooler Vinegar people didn't do anything but handle vinegars and ciders and Mr. J. C. Mayfield came into possession of that, and I don't know what he handled after I quit him. I couldn't say what he handled because I wasn't on his floor at work. Where I worked was where I done the other work and I stayed there until my quitting time and then I went home. I knows part of the products that were made by these concerns I worked for. As I have just told you of the Celery-Cola people I know what they sold and I did know of J. C. Mayfield at one time selling "Hop-Ale," something of that kind; that's all I know about his sales. No, sir; I don't know how many brands of vinegar J. C. Mayfield sold, but I know how many the Schooler Vine-

(Deposition of Tom Anderson.)

gar Company sold when I worked for them. They only sold two brands. "Elko" was the clear vinegar and the other was called "White-Wine Vinegar." The Celery-Cola Bottling Company did not handle any vinegar, nor did they handle any "Hop-Ale" while I worked for them, nor any cider. Yes, sir; James W. Dickson was working there when I was working there; he was drayman there at that time. I couldn't say whether that was all he did or not because his work was on the upper floor above me, and my work was before me, and I stayed up there on my work and didn't know what anybody else did. No, sir; he was not driving wagons on the top floor, he couldn't drive it up there, you know. I did say he was drayman, but he didn't drive on the top floor. I understand a drayman is a man that receives and delivers any parcels or packages to and from others in any part of the city and the town, a man that drives a wagon. [1418] You ask how long he drove a wagon on the top floor; I didn't say he drove a wagon, I said he drove a dray,—I told you I didn't know what other work he did do. When I was there his principal work around there was driving a dray. You ask if he was just driving a public dray or if he was employed regularly by the company; well, he was employed by the company while I was there, by some one in the house. I know he didn't own the team, because the company owned it. Well, no, sir; I didn't wash bottles around there. Washing bottles was out of my line. I bottled and mixed the drinks,—I had men to wash the bottles,—

(Deposition of Tom Anderson.)

or boys, rather. I believe Mr. Moody owned the Celery-Cola Bottling Company when I was there,—John Ensley and Mr. Moody, as far as I know.

“Q. (By Mr. HIRSCH.) You want your \$1.50 fee for attending here, do you Tom?”

“A. Yes, sir.”

The witness, Tom Anderson, having claimed his witness fee for attendance, \$1.50 was paid him by counsel for plaintiff.

Deposition of George E. Anderson, for Plaintiff (In Rebuttal).

GEORGE E. ANDERSON (Col.)

Direct Examination by Mr. HIRSCH.

I live at 309 S. 15th St., Birmingham, Ala. I work at 9½ North 20th St., hat cleaning and blocking. I came to Birmingham about 1902. Yes, sir; I know Mr. J. C. Mayfield, Mr. Will Mayfield, and Mr. Steve Mayfield, and I worked at one time for the Mayfield Manufacturing Company for about three years, I reckon. I don't exactly know what years they were. When I first went to work for them the Mayfield Manufacturing Company was on Powell Avenue and 20th St. I worked with extracts and vinegar, as helper. When I first went there I was helper, and then, later, I worked in the extract part, syrups and extracts. We made vanilla, and raspberry, “Pepsin-Ola,” and extracts,—Cassia, Ginger-Ale,—I believe that's all. Yes, sir; we made “Celery-Cola.” No, sir; while I was working there I never heard of them making or selling or handling

(Deposition of George E. Anderson.)

any product by the name of "K-O-K-E," nor did I ever see any barrels or labels or anything else with "K-O-K-E" on it. You ask who else was working there; there was a colored fellow named J. W. Dickson, who was drayman, and Miss Alice Wheeler, who was the stenographer, and Mr. Garrett, who was bookkeeper, and Mr. Pogue and Mr. Barclift, who were salesmen. That's all I remember right now. [1419]

Cross-examination by Mr. LITTLETON.

I said the concern I was working for was the J. C. Mayfield Manufacturing Company. You say that I forgot to mention my father and you ask if he was not working there too; he was working in the bottling department bottling soda water. You ask if he was not working for the J. C. Mayfield Manufacturing Company; I don't think right at that time that he was working for the people what had the soda-water department, Mr. Ensley and them. I said I worked in the extract department; I mixed the syrup,—they had vanilla and lemon,—different kinds of syrup. There wasn't but just one person mixing syrup at that time and that was me. After I left, James W. Dickson came in my place. I was there in 1902, I reckon. I don't remember exactly what year I was there, but I worked there about three years. About three years from 1902 would take me up to about 1905 and during all that time James W. Dixon was the drayman. No, sir; he was not a superintendent of the colored people there at all. I am 24 years old. You ask if I was about

(Deposition of George E. Anderson.)

eleven years old at that time; I don't know exactly, I never did know my exact age. We got it misplaced,—we had it in the Bible,—that's the way I count. I don't know exactly how old I am. Yes, sir; I was just a boy at the time I was working there; I was just leaving school. I was working up on the second floor of that establishment. You ask how many people were working up there on the second floor; there wasn't but me, one, up there. What I did up there was to mix syrups,—they have different syrups what I mixed, and jugs to send to different places. Mr. Will Mayfield was my boss up there. I did just what I was told to do. Yes, sir; I know what I was mixing up,—like these extracts. No, sir; there wasn't any “Dope” there at all. I never seen anything like that. It wasn't until here of late that I seen the word “Koke.” I never knowed nothing about it at that time. We mixed the syrup in a barrel, with a paddle. To make the vanilla syrup we would take the simple syrup,—granulated sugar,—and put the extract in it. “Celery-Cola” syrup is made the same way, because it is just stirred up that same way. Simple syrup is just sugar dissolved with water. I did the dissolving. I quit this plant because my father was mean to me and I ran away from home. Tom Anderson, who was just on the stand is my father. [1420] No, sir; he and I have not talked this matter over. Nobody saw me at all about my testimony but Mr. Bodeker. He saw me sometime in April, I think. I told him about the same thing I told you. He didn't tell me any-

(Deposition of George E. Anderson.)

thing about it. He just said you all was coming and I have to come before you all, that's all. Down at the Mayfield Manufacturing Company I earned \$6.00 a week. I was just a laborer there to do the actual work of stirring the paddle and mixing the syrup. No, sir; nobody stood there to direct me how to do it. They knowed I knew how after working with Mr. Will Mayfield. They just gave me orders and told me to fill it, write the order out and the card if it is to be shipped. No, sir; I was not in the labeling department. You ask if I knew what label they put on the stuff when it went out; they didn't have no label as I know of, only them stencils they put on barrels. I didn't see any labels at all. No, sir, I didn't see any "Celery-Cola" labels, they have "Celery Cola" labels down in the bottling part, where Mr. Ensley has the bottling syrups, like they used to put on "Coca-Cola." I never did see any "Celery-Cola" labels go on the barrels. They didn't have any barrel labels while I was there except the stencil they had—stenciled on vinegar and the different things they had. You ask if I saw the labels on the different brands of vinegar they sent out; they didn't have no label, they had a stencil to put on the barrels with lamp-black and put on the wood. It wasn't no label but just that stencil. I am sure they didn't put any labels on the "Celery-Cola" barrels, because they didn't have none.

Redirect Examination by Mr. HIRSCH.

"RDQ. 85. Do you claim your \$1.50 for attendance?"

(Deposition of George E. Anderson.)

“A. Yes, sir.”

(The witness, George E. Anderson, having claimed his attendance fee, \$1.50 was paid him by Counsel for Plaintiff.)

Deposition of Mack Crawford, for Plaintiff (In Rebuttal).

MACK CRAWFORD (Col.).

Direct Examination by Mr. HIRSCH.

I live at 213 N. 15th St., Birmingham. I have been living here in Birmingham about twenty years. I am going on 63 years old. Yes, sir, I have known Mr. J. C. Mayfield and I done hauling for the Celery Cola Company. Their place of business at that time was over on Morris Avenue. That was 1906. I don't know what the stuff was I hauled for the Celery-Cola Company more than just barrels and boxes. [1421] No, sir, I never did see any barrels or boxes or anything with the name “K-O-K-E” on it; the only thing was “Celery-Cola,” I don't know anything else but that.

Cross-examination by Mr. DART.

I didn't haul anything but “Celery-Cola” as I know of. I didn't know no other name but “Celery-Cola,” that's the only name I know of.

“Q. (By Mr. HIRSCH.) Mack, do you claim your attendance fee, \$1.50?”

“A. Yes, sir.”

(The witness, Mack Crawford, having claimed his attendance fee, \$1.50 was paid him by counsel for plaintiff.

**Deposition of Walter Thomas, for Plaintiff
(In Rebuttal).**

WALTER THOMAS (Col.).

Direct Examination by Mr. HIRSCH.

I live at 5008 Avenue K. Birmingham, Ala. I have been here continuously nearly 25 years. Yes, sir, I knew of the J. C. Mayfield Manufacturing Company and of the Celery Cola Co. Mr. Mayfield was the manager of these concerns. The connection I had with them was that I used to be drayman—hauled out goods. When I did the hauling they were at 2116 Morris Avenue, that was between 1906 to 1908. I hauled “Celery-Cola” and “Pepsin-Cola” for them. No, sir, I never did haul any product, nor did I see any product of theirs, by the name of “K-O-K-E.” I never saw any labels or anything with “K-O-K-E” on it in there nor any barrels or stencils or anything with “K-O-K-E” on it.

Cross-examination by Mr. LITTLETON.

That’s all I ever hauled, “Pepsin-Ola” and “Celery-Cola.” I never hauled any of the other products that they made, that’s all I know of.

**Deposition of M. D. Ziegler, for Plaintiff (In
Rebuttal).**

M. D. ZIEGLER.

Direct Examination by Mr. HIRSCH.

I am 27 years old and reside in Birmingham, Ala. I was employed recently by the Coca-Cola Company to make an investigation here in Birmingham, with

(Deposition of M. D. Ziegler.)

Mr. Frank Platt, who is the one who employed me. Plaintiff's Rebuttal Exhibits Nos. 68, 70, 73, 74, 76, were purchased on March 15, 1915 at the Florence Bar, the Bradley & Carr bar on 18th Street, the Higgins Bar, the Woodward Bar and Morris Hotel Bar, respectively. [1422] Plaintiff's Rebuttal Exhibits Nos. 69, 71, 72, 75, and 77 were purchased respectively at the respective bars above mentioned on March 26, 1915. Each of these bottles was purchased by Frank Platt in my presence. In each instance he called for "Coca-Cola" and in each instance I saw one of these bottles handed to Mr. Platt in response to his order for "Coca-Cola." Nothing was said on any of these occasions to explain that it was not "Coca-Cola" that was in these bottles. I signed the labels pasted on each of these bottles. (Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits #68 to #77, inclusive.)

Cross-examination by Mr. LITTLETON.

I think Mr. Platt is an investigator. I don't know whether he is a detective or not. I think he is one of these fellows that goes around and investigates facts. Yes, sir, I was paid \$1.50 a day for my work in going around witnessing these purchases. I was hired to act as a witness by Mr. Platt,—to act as a witness for these purchases. I am an automobile mechanic and have a job now. I did not have that job at the time I made these investigations. At that time I was working in an automobile job. Mr. Platt told me he wanted me to witness these

(Deposition of M. D. Ziegler.)

purchases to see if he got "Coca-Cola" when he called for it, I guess, and he told me he wanted me to be a witness, so that I could testify in this case and I accepted that employment in order to qualify myself to be a witness in this case. Yes, sir, I could read. Yes, sir, I saw these bottles when they were put out on the counter. I saw the labels very plainly and I don't think anybody could ever seduce me or deceive me by giving me that for "Coca-Cola."

Redirect Examination by Mr. HIRSCH.

No, I am not employed by the Coca-Cola Company and I have not and never have had any connection with it other than as stated above.

Deposition of Miss N. L. Bonham, for Plaintiff (in Rebuttal).

MISS N. L. BONHAM.

Direct Examination by Mr. HIRSCH.

I live in Central Park, Birmingham, Ala. I have lived in Birmingham about fifteen years continuously. I work now for the McKinley, Anglin & White. Yes, sir; I know the Mayfield Manufacturing [1423] Company and I worked for them at one time. I don't know exactly when it was but it must have been between eight and nine years ago. I was stenographer. Yes, sir; I made out bills. Of course, I knew in a general way the business they were carrying on, but I didn't have anything to do with anything except writing the letters and making the bills. However, I saw things that were going on. No, sir, I never did see any product down

(Deposition of Miss N. L. Bonham.)

there or anything down there with "K-O-K-E" on it, nor did I make out any bills or write any letters with "K-O-K-E" on it, and I never saw any advertising of "Koke" or any letters with "Koke" on them that I remember at all. I might have seen it, but I don't recall it,—I don't recall seeing anything with that name on it at all.

Cross-Examination by Mr. LITTLETON.

That's been a good while ago, about eight or nine years ago and if there had been anything of that kind down there it has passed out of my mind.

Deposition of Will Barrow, for Plaintiff (in Rebuttal).

WILL BARROW (Col.)

Direct Examination by Mr. HIRSCH.

I live at 1422 Fourth Avenue, Birmingham. I have lived here for the past 11 or 12 years and am now employed at the Frisco Round House. I am 24 years old. I started work for the Mayfield Manufacturing Company in 1906 or 1907 and worked there about a year and a half or two years, I believe. Their place was located at 2116 Morris Avenue. I commenced as a bottle washer and ended as a bottler. The drinks I saw around there, or bottled during the time I was there, was "Celery-Cola," "Pepsin-Ola," soda-waters and "Hop-Ale." No, sir, I never did bottle or see any drink around there known as "K-O-K-E," nor did I ever see any labels or anything around there with "K-O-K-E" on it. I don't know all of those who were working there when I was

(Deposition of Will Barrow.)

there, but Dickson is one I know and Mr. Will Smith, a white gentleman, was working there at the time; I don't know all of them.

Cross-examination by Mr. LITTLETON.

Yes, sir; I was working for the Celery-Cola Bottling Company. You say you thought I told Mr. Hirsch, a moment ago, that I was working for the J. C. Mayfield Manufacturing Company; he was running the [1424] Celery-Cola Company on Morris Avenue, so they said. I was working on Morris Avenue for the Celery-Cola Company. Yes, sir; I now say that I was working for the Celery-Cola Company at 2116 Morris Avenue and not for J. C. Mayfield. You ask if I mean to say I don't know the name of the Company I was working for; yes, sir, I know it. You ask which one it was I was working for; I was working for the J. C. Mayfield Manufacturing Company. You say, then, that I was not working for the Celery-Cola Company; he was bottling it at the time I worked for him. You again ask which one of these companies I was with; I worked for the J. C. Mayfield Manufacturing Company on Morris Avenue and he was bottling "Celery-Cola" at the time I was working for him. You again ask which company I was working for; I was working for the Celery-Cola Company, I suppose. You say that just a minute ago I said I was working for the J. C. Mayfield Manufacturing Company; that's where I was working at. I was working down stairs. I started there as a bottle washer and Sam Henderson, the shipping clerk, got Mr. Mayfield to give me a job bottling. I

(Deposition of Will Barrow.)

bottled "Celery-Cola," soda-water, "Pepsin-Ola" and other soft drinks. He was making a lot of drinks there. I can recollect the drinks that I bottled. I put plain undecorated crowns on those bottles and also on the "Celery-Cola" bottles as late as 1907. There was some little dark bottles,—some seven-ounce bottles of each kind. The word "Celery-Cola" was not on the crowns. I worked there about a year and a half or two years and quit because I got hurt. A bottle burst on me and cut my leader in two. I went to school a short while at Roanoke, Alabama,—I haven't got any education at all hardly. No, sir, I can't read and write, not much, just a little bit. Yes, sir, I am sure about that. You ask me to read the top word on a sheet of paper you hand me; "S-c-h-e-d-u-l-e N-o 1." You now ask me to read the third word, on schedule 16 on the Notice to Take Depositions; that's "Root Ford" (Rutherford.) You ask me what is the other word; "it is "C-a-r-l-i-s-l-e"; you ask what that spells; I can't pronounce it. You ask what other products they were handling there at this place besides these soda-waters I was talking about; well, they handled some "Hop-Ale" and stuff called bitters, that's all I can remember besides soda-water, "Hop-Ale" and bitters. They were not handling anything else that I know of. Oh, they handled cider and vinegar. [1425] No, sir, I don't know the brands they put on the cider or what was on the labels. I can't remember about them at all. You ask if I can remember the different brands labeled on the vinegar; well,

(Deposition of Will Barrow.)

O. L. Gregory Vinegar Co. I wasn't with that company at that time, I was working with Mr. Mayfield,—he got the vinegar from that place. I don't remember what brands he put on the vinegar. You say that the substance of it all is that he was making a number of different kinds of soda-water down there and some Cola drinks and some extracts and that I remember some and some I don't remember, and you ask if that isn't the substance of my testimony; well, I remember what I saw, I know what I saw go out there. No, I don't know the names of the cider or of the vinegar, but I do know the names of all the soda-waters he handled down there. He handled strawberry, lemon, orange phosphate, "Celery-Cola," "Pepsin-Ola,"—I think that's all I can remember. I won't say but there was others, but these is what I can remember. There may have been others. That's been a long time ago and there may have been others that I can't now remember the names of,—yes, sir, that's right, there may have been others. Yes, sir, this fellow Dickson was mixing syrup when I was there and I was botling the syrup after he mixed it for me. Yes, sir, I put labels on those bottles. They were little labels shaped like that (indicating) just the same shape of the 5-A label they use down here now. It's an oblong label. The word Celery-Cola was written on it, "C-E-L-E-R-Y C-O-L-A." It was printed on there in writing and in red, I believe. The label was blue but the writing was red. You ask if, as a matter of fact, it was not all blue with the writing a darker

(Deposition of Will Barrow.)

shade of blue and the label a lighter shade of blue; well, it's been so long ago,—yes, sir, I know a good deal about the labels. James Dickson first saw me about testifying as a witness on behalf of the Coca-Cola Company on March 15th. He came and talked to me about this thing and Mr. Bodeker came next. Dickson told me he wanted me for a witness. He didn't tell me to say nothing. They just told me they wanted me to tell what I know of it. You ask what Will Smith was doing at the plant at the time; he bottled, too, and labeled. [1426] He, a white boy, and I, a nigger, worked side by side. Yes, sir; I am a negro. Then they had a young white boy there who was bottling, too, named Howard Trent. He wasn't a regular bottler, but he did other kind of work, and bottled, too. After I left I don't know what happened down there. Howard Trent assisted the shipping clerk, I think, the only time I seen him there. It was only at times that he used to bottle. That's all I can remember of the people down there. No, sir. I don't know Homer Brewery, nor George Anderson, nor do I know who the stenographers were down there at that time. I said I worked down stairs in the back. I didn't work in the front of the place at all, nor did I work upstairs. I don't know what they were making up stairs.

Redirect Examination by Mr. HIRSCH.

No, sir; I didn't bottle either the cider or the vinegar.

Recross-examination by Mr. LITTLETON.

I said I did the bottling,—that I was first a bottle

(Deposition of Will Barrow.)

washer and afterwards did the bottling. No, sir, I didn't handle any of the barrel stuff that went out at all, and of course, I don't know what labels were put on barrels that went out. "Q. (By Mr. HIRSCH.) Well, do you claim your witness fee for attendance?" "A. Yes, sir."

(The witness, Will Barrow, having claimed his witness fee for attendance, \$1.50 was paid him by counsel for plaintiff.)

**Deposition of John L. Bevell, for Plaintiff
(In Rebuttal).**

JOHN L. BEVELL.

Direct Examination by Mr. HIRSCH.

I reside at 748 First Avenue, East Lake, a suburb of Birmingham. I have lived here in Birmingham continuously since the latter part of 1899. I worked for the J. C. Mayfield Manufacturing Company at one time, but I was small at the time and don't know exactly how long ago it was. When I first went to work for them their place was located on 20th St. and Powell Avenue, but afterwards they moved from there to Morris Avenue. I started work for them doing everything in general,—washing bottles. Later on I learned bottling and then I did the bottling. Yes, sir, I put labels on bottles, jugs, kegs and barrels. Yes, sir, I was familiar with the stencil used by the J. C. Mayfield Manufacturing Company. The drinks they were putting out were soda-water, "Celery-Cola" and "Pepsin-Ola,"—I believe that was [1427] the name of it,—and that's all

(Deposition of John L. Bevell.)

that I can remember that we were putting up. You ask who was working there at the time I was there; Will Smith and Howard Trent were bottling at the time and there was a negro working there by the name of Dick,—I forget his last name. The last time I was there I did the labeling. No, sir, I never did label any barrels, boxes, jugs, kegs or containers of any kind with the name “Koke,” nor did I ever see or hear the name “Koke” around there in any shape or form so far as I remember. They were not manufacturing anything by the name of “K-O-K-E” so far as I rememebr. Myself and others handled the stencils and labels. I seen Mr. J. C. Mayfield and Mr. Will Mayfield down at the Hillman Hotel a few months ago when I was driving a taxicab. Mr. Mayfield showed me a card with the word “Koke” on it and asked me did I remember anything about them bottling it when I worked for them and I told him I didn’t. He said the Coca-Cola Company were suing him, or something to that order, and that he might want me as a witness to go to New Orleans when it came up and that he would let me know further. Plaintiff’s Rebuttal Exhibit #78 is the book which I had when I was working for the Mayfield Manufacturing Co. Yes, sir, I wrote these down in that book myself, I copied them from the man what was mixing syrup at the time,—his name was Herbert Childerson.

Cross-examination by Mr. LITTLETON.

Since 1899, I have been driving an automobile and working in an automobile shop and I worked at one

(Deposition of John L. Bevell.)

time for the Hyland Bakery. At present I am bottling for the Chero-Cola Bottling Company, where I have been employed for about three weeks. At the Hyland Bakery I made bread and pies,—I worked on the bread crew. The Hyland Bakery made bread, pies, cakes, rolls, biscuits, doughnuts. Yes, sir, the Chero-Cola Bottling Company bottles Chero-Cola and a number of different flavors of soda water. No, sir; I didn't just bottle at the J. C. Mayfield Manufacturing Company; when I first went to work there I went to washing bottles. It's been so long ago that I don't remember but I think Howard Trent was working there before I went to work there and I think he was washing bottles along with me and that he bottled at the time. I don't know how long I worked there, I couldn't tell you. [1428] I think I went to work there about the latter part of 1903 or 1904, on 20th St. I expect I was there a couple of years,—I know it was over a year. All the time I was working for them I worked for the J. C. Mayfield Manufacturing Company. You ask if I ever worked for the Celery-Cola Company; well, that's the same Company. You ask if I ever worked for the Celery-Cola Bottling Company; I don't know, sir, how they run all them. I know I was working for Mr. Mayfield and he was paying me,—I don't know what name the Company went by. No, sir, I don't know anything about his vinegar Company. I will be 25 years of age my next birthday. Yes, sir, I was about 14 or 15 years old when I was down there. Yes, sir, I was wearing short pants. No, this fellow,

(Deposition of John L. Bevell.)

Herbert Childerson, didn't mix the syrup on 20th Street, he mixed that on Morris Avenue; "Pete" Mayfield done most of the mixing on 20th Street,—that was the young Mayfield boy. "Pete" is just a nickname we call him by. I don't remember what his right name is. I think after they moved over to Morris Ave., that after that the negro Dick mixed the syrups a while. If I remember right, those three are the only ones that ever mixed syrups while I was connected with the Company. Yes, sir, I did the bottling for a while when they were on Morris Avenue,—I didn't bottle on 20th Street to amount to anything. The machine we were using at both places was a Crown machine, and we put decorated crowns on the bottles. The "Celery-Cola" had a decorated crown on it at both places from 1903 up to the time I quit there. I think, though, there was one kind of soda-water that they bottled with a plain crown, but I don't remember what that was. They were making a number of soda-waters. All that has been a long time ago and I was a small boy at that time. I couldn't remember what all they were making. Of course, there was a lot of stuff that I didn't see and didn't know nothing about. I couldn't remember none of the labels that they had,—that is, a description of them,—because they kept most of the labels on the second floor at the 20th street plant. I was washing bottles and labeling the drinks that they put up. I don't think they labeled the soda-water when they were on 20th St. Of course, I was not in the advertising department at all, and don't know

(Deposition of John L. Bevell.)

anything about the advertising; I was back in the bottling department. What went on in the front of [1429] the building, up around the office, why I didn't know nothing about at all. The particular brands which I mentioned in my direct examination are all that I can remember now.

“Q. (By Mr. HIRSCH.) Do you claim your attendance fee?

“A. Yes, sir.

(The witness, John L. Bevell, having claimed his witness fee for attendance, \$1.50 was paid him by counsel for plaintiff.)

(The following rebuttal depositions were taken by plaintiff as rebuttal testimony at New Orleans, La., on June 3, 1915:)

**Deposition of A. B. Freeman, for Plaintiff
(In Rebuttal).**

A. B. FREEMAN.

Direct Examination by Mr. HIRSCH.

I have heretofore testified on behalf of the Plaintiff in this case. Yes, sir; I, together with H. B. Pierce, of Atlanta, Ga., had a conversation during July, 1914, in the City of New Orleans, with Mr. William Dalton, of New Orleans. Mr. Pierce was present when I had that conversation. It occurred in Mr. Dalton's office in the Hennen Building. We called on Mr. Dalton and he told us he didn't care to make a statement that would be used, for the reason that he had entirely severed his connection with the Koke Company and was engaged in another line of

(Deposition of A. B. Freeman.)

business, and that he didn't believe he could gain any friends by making a statement or being a witness and that he stood a chance to lose some; but we discussed the case with him. He told us that he had first become connected with the Southern Koke Company, Limited, as a stock broker, or as selling their stock; that he succeeded in selling some of their stock to some of his friends,—I don't think he mentioned the amount,—and that on the death of Mr. Scott, who was killed by a street-car,—he was made general manager. My recollection is he told me that he didn't know anything about the running of that particular business, but that he took it in order to protect himself and his friends in their stock holdings. Then we talked about the manufacture of the syrup and he told us that they manufactured it here in New Orleans from the extract that they got from Van Dusen of St. Louis. [1430] He said he understood it was manufactured on the "Coca-Cola" formula,—he had been told that by Mayfield who claimed to have owned an interest in the "Coca-Cola" formula and to have had the original "Coca-Cola" formula. They got the extract from Van Dusen and mixed it with sugar and water and coloring matter, I believe, here and put it in barrels and supplied the territory in and around New Orleans with syrup and made bottling extracts, etc. He told me that he was only connected with them as general manager for a comparatively short period,—probably one or two months—and that he severed his connection during August, probably, at which time, as he expressed it,

(Deposition of A. B. Freeman.)

he forced Mr. Mayfield to buy him out,—not only his interest, but his friends' interest, and he also stated that was what he set in to accomplish, he wanted to protect the people that he had asked to buy stock in the company. We asked him about the marketing methods of the company while he was general manager and he said the conversations that he had with his salesmen, as they would come in to report, were something like this: They would go around to a dealer who was handling "Coca-Cola," introduce himself, of course, as salesman for the Koke Company, and ask them about their sales of "Coca-Cola,"—"Do you sell much 'Coca-Cola?'" The dealer would usually say, "yes, we sell so much"—meaning the number of gallons that they would probably consume during the year; and their salesmen would point out to them that they were manufacturing a product that was identical with "Coca-Cola," manufactured on the old, original "Coca-Cola" formula, and were marketing it under the name of "Koke,"—I don't recollect that he used the word "Dope" or that it was mentioned during our interview; I am pretty sure it was not, but the word "Koke" was used. The salesman, of course, knowing in advance what the standard price of "Coca-Cola" was, would ask the dealer the price of "Coca-Cola" and then tell him that he could sell him "Koke" syrup, which was identical, at a very much lower price. He also had some stock scheme for giving away so much stock with so many gallons of syrup,—I have forgotten just the details of that. But he would ask the dealer

(Deposition of A. B. Freeman.)

this question: "Don't a great many people who come in here and ask for 'Coca-Cola' ask for 'coke?'"

[1431] In the majority of cases the dealer would say that they did, but that he, of course, always served "Coca-Cola"; so the salesman would tell them that their product was identical, that it was named "Koke," and that there was no reason why they couldn't serve "Koke" when "coke" was asked for and that if they would contract for a certain quantity of "Koke" they could save considerable in the price and they would also be entitled to some stock in the Southern Koke Company's business on the purchase of a certain number of gallons of "Koke." I asked him the question, "Didn't some of the dealers, though, suggest to you that that would probably be unfair, that they knew that the customers in calling for "coke" were using it simply as a nickname for "Coca-Cola?" He said that some of them did, but that the salesman would point out that their product was named "Koke" and that the dealer had no way of knowing whether they meant "Coca-Cola" or "Koke" when a man called for "coke" and that they, therefore, would be doing nothing wrong if they sold him "Koke." He also stated to me about that time. "You fellows made a great mistake whenever you allowed the word 'Koke' to be trademarked;" and I said, "I don't think we did, Mr. Dalton, because I believe you will admit that the word 'Koke' was used by the Southern Koke Company merely as a word play on what they knew to be a nickname for 'Coca-Cola,'" and I said, "You know that 'Coke' is

(Deposition of A. B. Freeman.)

a nickname for 'Coca-Cola'." He said, "Oh, yes, that's generally understood." "Well, then," I said, "I don't think they made a mistake in allowing that to be trademarked, because no business that's conceived in iniquity and born in sin will ever be ultimately successful"; and I said, "Probably that's one of the reasons why you got out of it,—you said you had several good reasons?" He didn't reply to that and the conversation took other lines, but when we went to leave he repeated that very quotation and said, "That's one of the reasons that I got out of it, I didn't think it was exactly the right kind of business to be in." We also had some conversation about advertising. He said that they did some little advertising, that he recollected it, and that the shipping clerk was instructed to ship out advertising with each order that the Southern Koke Company shipped out. He said he knew that there were some places in New Orleans that displayed [1432] "Koke" advertising, but outside of New Orleans he didn't know because he said he hadn't been through the territory.

Cross-examination by Mr. LITTLETON.

I was not present in the room when Mr. Dalton testified in this case, but I was present during some of the time when testimony for both parties was being taken.

I interviewed Mr. Dalton for the purpose of using him as a witness in behalf of the Coca-Cola Company and, notwithstanding the fact that *the* made this remarkable statement to me, he was not put on the witness-stand as a witness. There was no one else

(Deposition of A. B. Freeman.)

present when this conversation occurred except Mr. Dalton, Mr. Pierce and myself, the stenographer was in the front office. I saw Mr. Dalton with reference to this matter twice. These two interviews were about ten days apart. Mr. Pierce was present only at the first interview. There was no signed written statement made at the first interview, as he said he didn't want to be used as a witness, but a statement of the facts which he then told was written up and I called on him the second time to get him to sign that statement. He got very angry and said "I told you at the first interview that I had no friends to lose,—could make no friends by becoming a witness, and I stood a chance of losing some." He mentioned, also, that he was a candidate in some secret or other society and that he thought he might possibly injure himself if he became a witness, and that he didn't care to sign the statement, and didn't care to be a witness at all. He acknowledged, however, to what he had said, and that the statement was correct, but that he simply wouldn't be a witness. No, sir; he did not say that the only people he wanted to, or instructed his salesmen to go to, were "Coca-Cola" customers, I don't recall that he said that. This long statement I have just given was both a statement of what Dalton said that he had told his salesmen and what his salesmen told him they had done,—it was his experience in dealing with his salesmen during the time he was general manager. That part of it relating to instructions that he gave the

(Deposition of A. B. Freeman.)

salesmen, the line of selling talk, the line of argument that they should use, was his direct statement. [1433] That was the particular argument they used to off-set the fact that a great many customers in calling for "Coca-Cola" asked for simply "coke." I don't think that the instructions which he gave his salesmen when they went out to sell, say, a "Glee-Nol" customer, were touched on during the conversation. I don't recall that anything he might have told his salesmen when they went out to sell a customer of any of the other cola drinks was touched on during the interview. You ask what part of this was the statement of his salesmen,—the gossip I was telling about; well, he mentioned the fact that some of the dealers had said to his salesmen that they understood "Coca-Cola" was meant when "coke" was called for, and that he had then told them that they could say to them that as "Koke" was made on the original "Coca-Cola" formula and was a trademarked name, there could be no harm in selling "Koke" to a man who came and called for "coke," even if the dealer knew that he was expecting to get "Coca-Cola" when he called for "coke" and had previously been served with "Coca-Cola" when he called for "coke." No, sir, that is not all that was said at both of these interviews. Of course, it isn't a *verbatim* report of every word that was uttered on both sides, but it was the principal facts that were brought out during the conversation. There were, of course, a good many things of a personal nature

(Deposition of A. B. Freeman.)

about the business that he was engaged in. No, this is not all I can remember that was said at either of these conversations. We spent probably thirty minutes talking about a Mr. J. C. Wright, who was at one time Vice-President of the company and who was made a party to this suit, in telling us that he thought we made a mistake, that Wright wasn't any longer connected with it,—a considerably long conversation took place about that. He said all this at the first interview, which occurred in July, 1914.

Yes, sir; I am the manager of the Louisiana Coca-Cola Bottling Company. You ask if the Southern Koke Company was a competitor of mine; I don't think that company ever bottled goods in New Orleans, but the bottler who bottled their goods was a competitor of mine in a way. [1434]

Redirect Examination by Mr. HIRSCH.

Mr. Dalton told me positively 'that if we wouldn't call him as a witness he would not appear as a witness for the other side. He requested that he be not called, and I told him I wouldn't call him, and Mr. Pierce agreed to that.

Mr. HIRSCH.—I wish to reiterate and repeat my request made at the end of the taking of the depositions in Birmingham, of counsel for the defendant, for the production of Mr. J. C. Mayfield, Sr., to give him an opportunity, as set out on yesterday, at Birmingham. I ask Mr. Littleton, counsel for the defendants, if Mr. Mayfield is in the city?

Mr. LITTLETON.—No, sir, he isn't.

(Deposition of A. B. Freeman.)

Mr. HIRSCH.—I wish to state that the transcript of the record in the case of the State vs. Melville Rice was received by me on or about the middle of May, 1915, from Birmingham, Alabama, and that it was only a short time before that that I had any knowledge of the existence of the transcript of this record and that I had no knowledge of it at the time Mr. Mayfield was on the stand in New Orleans.

Mr. LITTLETON.—I state on the record that counsel for the defendants had no knowledge of the existence of the record until they got to Birmingham, and that before the taking of this testimony is finished, we feel quite sure Mr. Mayfield will take the stand and explain that record.

Deposition of O. C. Turrell, for Plaintiff, (in Rebuttal).

O. C. TURRELL.

Direct Examination by Mr. HIRSCH.

Yes, sir; I have testified in this case before. You ask if I ever had a conversation with Mr. J. C. Mayfield during, or about, May, 1913, in regard to the advertising of "Koke"; well, this was in Dallas, in the plant of the Koke Company,—I think it's the Southern Koke Company. The subject, I believe, was put to Mr. Mayfield as to whether or not they did any advertising, and he said, "We do some" and pointed to the advertising matter on the wall,—there were three little placards you might call them. It developed in further conversation that the parent company, described as the Koke Company of Amer-

(Deposition of O. C. Turrell.)

ica, didn't pay for any advertising at all,—they may have gotten out specimens, [1435] but he wouldn't say that they furnished advertising for any of the Koke Companies. He said that they didn't furnish any advertising matter, and that it was up to what he described as the subsidiary companies to club in, as they saw fit, and get out whatever advertising matter they wanted. You ask if he said anything to me about not having to advertise "Koke"; he said that he didn't,—let's see,—that came about in this way: I asked him the point-blank question as to whether or not the demand for "coke" was not caused through the medium of the "Coca-Cola" advertising, and he said that it was.

(Defendants object to the recitation of these alleged conversations with Mr. Mayfield because not proper rebuttal testimony, in that no foundation was laid for them in the examination of J. C. Mayfield. Overruled. Exception.)

He also said that the "Coca-Cola" formula was originally compounded by Dr. Pemberton and that he owned three-fourths of the business,—whether he meant by "the business," the formula or the business otherwise, I don't know. But he said that Dr. Pemberton at one time sold his interest, one-fourth, to a man by the name of Candler, and that he thought, under the circumstances, that he still owned three-fourths of the "Coca-Cola" business, and he thought, for that reason, that he was entitled to any benefits that might be derived from "Coca-Cola"

(Deposition of O. C. Turrell.)

advertising,—in the marketing of the beverage “Koke.”

Cross-examination by Mr. LITTLETON.

I am the superintendent here of the Pinkerton National Detective Agency. That's the agency which is employed by the Coca-Cola Company to gather evidence in this case against the various Koke Companies. I am the superintendent of the New Orleans office. I have no idea how many detectives the Coca-Cola Company has had employed on this case, because it was not handled from here,—we only undertook such work as we were instructed to do through the medium of our Atlanta superintendents. I supplied from my office probably as many as six or eight. I couldn't say definitely how long they were employed and I don't want to be guessing at it, but we have been working on it off and on,—oh, I should say, since 1912. [1436] In order to get a complete record it would be necessary to go into our method of handling and detailing operatives and all of that sort of thing. One of the primary instructions issued to our detectives was to ferret out cases of substitution, where “Koke” had been substituted for “Coca-Cola” and they have been actively engaged at that work off and on since about 1912. The number of men I have mentioned, are just those I have supplied from my office. Of course, I have no knowledge of the number supplied from the Atlanta office and from Chicago and elsewhere. This conversation I had with Mr. Mayfield was held in Dallas

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on May 15, 1913, at the plant of the company. One of our operatives, C. J. Woodman, connected with the Houston office, was present. That's not a detective employed from my office here. He is another one in addition to the six or eight that I had employed here. In addition to Woodman, there was present, part of the time, a man by the name of Boyd, who was in some way connected with that company. He was present during part of the conversation I have related. No, sir, I did not approach Mr. Mayfield under the false representation that I was an advertising man. Operative Woodman was there and approached Mr. Mayfield under the pretext of being interested in the purchase of some subsidiary company,—that is he was selling territory, you understand. Woodman approached Mayfield first and called on him on several occasions. Under the pretext, as I have stated, of being interested in arrangements to buy certain territories which Mayfield was going to sell,—for instance, we would let a territory to New Orleans, Chicago, Dallas, Atlanta, Jacksonville and the surrounding country,—you understand what I mean, and they would form what they would call subsidiary companies. Woodman was approaching Mayfield with the idea of giving Mr. Mayfield the impression that he was interested and would like to make arrangements to start a subsidiary company at some place in the United States, and Woodman was supposed to bring me forward as the man with money sufficient to promote the enterprise.

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You ask if I was the great "Eastern Capitalist"; well, I was introducee as having sufficient money to start the proposition. Yes, sir, it was exactly the 15th day of May, that this conversation occurred, because I was [1437]

it was pretty much on the same idea,—pretty much on the same. (Same objection by plaintiff. Overruled. Exception.) Some of the bottlers used the Crown Cork and Seal Company's seals,—and some used seals from other cork concerns,—other cap bottles. (Same objection by plaintiff. Overruled. Exception.) No, sir; I didn't put any labels on the bottles. (Same objection by plaintiff. Overruled. Exception.) You ask if there was any name blown in the glass in the bottle; why, some of the bottles had the names of the bottler on them and some had no names on them. (Same objection by plaintiff. Overruled. Exception.) You ask if I think a casual purchaser could tell the difference between my product and "Coca-Cola" by the color; well, mine is a good deal darker, almost as dark as root beer. (Same objection by plaintiff. Overruled. Exception.) (The witness was asked if he could tell the difference between a glass of his product, "Queen-Ola," poured into a glass and a glass of, say, "Rye-Ola," but he did not answer the question.) You ask why I color my drink with caramel; most of these drinks are colored that way. (Same objection by plaintiff. Overruled. Exception.) I colored my drink with caramel because it looks good that way,—

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and you can't detect a fly or bug that might be in it,—one good reason. (Same objection by plaintiff. Overruled. Exception.) You ask if that applied to my drink; I couldn't say about that, other people do the bottling part, but the syrup though, it doesn't apply, of course, though possibly one might get in it sometimes. (Same objection by plaintiff. Overruled. Exception.) You ask why I colored it that color instead of pink, green or some other color; it's just customary for it to be colored that way. (Same objection by plaintiff. Overruled. Exception.) I couldn't tell you why it is customary for it to be colored that way. (Same objection by plaintiff. Overruled. Exception.) I couldn't tell you whether or not everybody that bottles a drink like that colors it that way. (Same objection by plaintiff. Overruled. Exception.) You ask if I have ever seen a drink of that sort that was not that same color; there's some darker than others, but they are all about the same general color, oh, yes. (Same objection by plaintiff. Overruled. Exception.) Some of them are light, some very dark, and some medium. (Same objection by plaintiff. Overruled. Exception.) [1438] You ask me to explain what I mean by that, by comparison, and you ask if I ever saw a Cola drink that was, say, the color of ginger-ale; I don't know that I ever did. (Same objection by plaintiff. Overruled. Exception.) You ask if I ever saw a Cola drink that was absolutely black; I have seen some pretty black, yes, sir,—very dark,

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yes, sir. (Same objection by plaintiff. Overruled. Exception.) My drink tastes like a drink of its own; I have never tasted one that tasted exactly like it, I have never drunk one that I thought tasted like it. (Same objection by plaintiff. Overruled. Exception.) No, sir, mine is not a caffeine drink. (Same objection by plaintiff. Overruled. Exception.) I have no caffeine in mine. I put a little bit in it at the start, but I found it was all foolishness to use that,—it was too expensive. (Same objection by plaintiff. Overruled. Exception.) The volume of my business in “Queen-Ola” was very small. (Same objection by plaintiff. Overruled. Exception.) I don’t think I ever had over three bottlers. I had one good bottling plant that was using right smart and two other one horse concerns buying possibly a half barrel once every month, and, sometimes, once every two months. (Same objection by plaintiff. Overruled. Exception.) No, sir; I never did get out any advertising for my product, nothing but,—well, I did get out some cards at one time and sent them out to a bottling plant I had here,—“Drink Queen-Ola” is what it was. (Same objection by plaintiff. Overruled. Exception.) No, sir; the general public does not know about my drink being on the market, very few people know of it,—in fact, it isn’t on the market at all now. Possibly a few of the general public knew it was on the market when it was being made, but it wasn’t generally known because I had only a few bottling it. No, sir, I don’t

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know how my drink was sold at soda-fountains; I never sold but a few fountains. (Same objection by plaintiff. Overruled. Exception.) No, sir; I don't know how it was asked for by the consuming public nor do I know how the bottled goods were asked for by them. (Same objection by plaintiff. Overruled. Exception.) The reason why I happened to testify in this case is because I was summoned here. Yes, sir; Mr. George Bodeker, the gentleman sitting here, and Mr. Pierce, saw me with reference to my testimony before I was summoned. [1439]

there only one day. I went there from Houston, where I happened to be relieving the Houston superintendent. You ask if it would surprise me to know that Mr. Mayfield at that time was in Chattanooga, Tennessee, attending the Confederate Veterans' Reunion; it's out of the question that he wasn't in Dallas at that time, because I know him,—I have met him since and I know him. That was J. C. Mayfield, Sr. The substance of his interview was that the Koke Company of America did not do the advertising, but that the subsidiary companies advertised if they wanted to, it was a matter of their clubbing together. He explained to me that the subsidiary companies were the salesmen companies,—the ones that dealt with the public, that is the dealers,—they were the ones that sold the finished product to the dealers. They were practically separate organizations, but in a measure under the control of the parent company. I don't think he said he bought

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the Coca-Cola formula from J. S. Pemberton, but he did say he originally owned three-fourths of the original business. You ask if he didn't tell me, as a matter of fact, that he owned it in the Pemberton Medicine Company and that there were three others besides themselves in that partnership, namely: J. S. Pemberton, A. O. Murphy and Bloodworth; no, if you'll permit me to refer to my report, I will read just exactly what he said, but he didn't go into any detail like that at all.

(The following depositions were taken by the plaintiff in rebuttal at Dallas, Texas, on June 4, 1915:)

**Deposition of T. J. Haizlip, for Plaintiff
(In Rebuttal).**

T. J. HAIZLIP.

Direct Examination by Mr. ROGERS.

[1440]

I am forty-two years of age; I live at Fort Worth, Texas, and am a druggist, having a retail drug-store. I have been in the retail drug business in various and sundry capacities, I will say, ever since the spring of 1893. My first experience in the drug business was, to the best of my knowledge and belief, say about the 1st of June, 1893, with the firm of Bitting and Andrews, of Sherman, Texas. The full name of the Bitting who was the member of that firm is W. L. Bitting. My duties while I was with that firm were to deliver prescriptions, sweep and mop the floor,—just general roustabout, served a little soda water—

(Deposition of T. J. Haizlip.)

just general lackey boy for the drug-store. I was with Bitting and Andrews from June until about October, or possibly November, 1893—it was some time during the fall when they sold the store. I left at that time. Bitting and Andrews handled “Coca-Cola” during that time. To the best of my knowledge they got a barrel—I don’t know what size this barrel was, but it was more than what we term a keg; it might have been either a thirty, or might have been a sixty,—but anyway, it was what they term a barrel of “Coca-Cola,” from Atlanta. That was some time in the summer, I will say, of 1893. That was dispensed from the fountain at Bitting and Andrews store in 1893. If my memory serves me right they dispensed the entire barrel of “Coca-Cola” and they also had the exclusive right to sell “Coca-Cola” in the city of Sherman, and no other druggist had it at all during that year, if I am right. The biggest part of that Coca-Cola was dispensed over the fountain as a beverage. Usually it was asked for as “Coca-Cola”; there was a good many times when they just presented those little tickets which somebody had handed them—given away in the City when this barrel of “Coca-Cola” was purchased by this firm— [1441] and the person presenting them would lay down the ticket and say, “Well, I see you have these goods here,” and we would serve them “Coca-Cola” on the ticket. As a rule they didn’t ask for it, but, when they did ask for it, if my memory serves me right, they asked for “Coca-Cola.” You

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ask if any nicknames were used at Bitting's fountain at Sherman, Texas, during the year 1893 by the public in asking for "Coca-Cola"; I can say there was a few who called for "coke." To people who asked for "coke" during the summer of 1893, I served "Coca-Cola." I always took the name "coke" to mean "Coca-Cola."

(Defendant objects to the questions and answers with reference to the word "Coke" because not proper rebuttal evidence, and they moved to strike the questions and answers with reference thereto; objection and motion overruled. Exception.)

After I left Bitting and Andrew in the fall of 1893, I went to work for another firm on the north side of the square,—Mr. Perguin,—I believe he was a German—he had a drug-store there at Sherman Texas. I returned to Mr. Bitting in the early part of 1896,—I am not positive, but probably about March. On this occasion I stayed until some time in 1898—just a little more or less than two years, I am not exactly positive with regard to it. At that time I was prescription clerk, and also had something to do with the soda-fountain. Mr. Bitting was serving "Coca-Cola" at his fountain at that time and I dispensed it. If my memory serves me right, the public usually asked for it as "Coca-Cola"—I don't remember the word "coke" being applied to it much [1442] at that time, it might have been, however. You asked what I understood by the name "coke" at that time as applied to soda-fountain beverages;

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well, I understood that they meant "Coca-Cola." W. L. Bitting had the exclusive right in 1893 to sell "Coca-Cola," but after that year the Coca-Cola Company sold "Coca-Cola" to every soda-fountain that would buy it, regardless of giving Bitting any right as to how much they should have—in other words, because Mr. Bitting couldn't have the exclusive right, he got mad and said he could "make himself some of that blamed stuff, anyway," and during that time he attempted, to my mind, several times to make it, all of which, if my memory serves me right about it never was used—they never would drink it, they refused what was set out to them, and oftentimes he would then laugh and give them the genuine "Coca-Cola." Mr. Bitting didn't make up but just a little of it at that time—a bottle of it at that time—and handed it to his friends, and asked "wasn't it a pretty good imitation of Coca-Cola." Oh, yes, he tried to sell some of it over the fountain in response to calls for "Coca-Cola." When people came in and asked for "Coca-Cola" he would try to sell them that product of his as "Coca-Cola." The result was they would take a case (glass?) of it and set it down, and he would laugh and give them "Coca-Cola" and say, "I was just trying to see if I couldn't substitute on this "Coca-Cola." That was in 1896 or 1897.

(Defendants object to the foregoing testimony because not proper rebuttal evidence, and no foundation was laid for it in the examination of defendants' witnesses, and they move to strike the said testimony.

(Deposition of T. J. Haizlip.)

Objection and motion overruled; exception.) [1443]

During the time I have testified about concerning my first employment with Mr. Bitting in the spring and summer of 1893, there was no drinks other than "Coca-Cola" of similar character sold there in Sherman, Texas, nor was any drink of similar character being advertised around Sherman. I think I can answer that, being positive; there are some few things, however, that I may not be absolutely correct in—so far as Mr. Bitting trying to make "Coca-Cola"; but I know positively that Mr. Bitting did attempt to make some kind of drink, but whether he gave it any name, or whether he tried to put it out as "Coca-Cola," I cannot be exactly correct, owing to the length of time it has been since that occurred; but I know very well I have seen him experimenting, and I know that he tried to make "Coca-Cola," or "Koke," or some kind of drink, now, whether he called it "Coca-Cola" or tried to serve it as "Coca-Cola"—but that was just a few times, possibly,—he didn't try it more than a dozen times. He didn't work it as a rule, it was just merely, you might say, if anything,—well, in his leisure hours, he might go back and make up a bottle and try to sell it, maybe a dozen times. He didn't do it as a business, however, I will say that positively.

Cross-examination by Mr. LITTLETON.

I was about twenty years old when I went to work for W. L. Bitting. That was the first work I had ever done. At that time the soda-fountain industry

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had not spread out like it has at this time. There were just a few fountains here and there, and a few drinks only were served. They didn't even serve ice-cream; they had just a few, such as [1444] strawberry and vanilla syrups, a few things like that—and they served those just with the foam on top of them, and then they served “Glass-Ade,” which was just a little syrup with the ice on top of it, and people came in and ate it with a spoon. Mr. Bitting was the first one to handle “Coca-Cola” in and about Sherman. That is the first I knew of “Coca-Cola.” On that question I am quite positive. I know Mr. Bitting had the exclusive right to “Coca-Cola”—I remember that very positively; and he bought the first barrel, and I remember the man who sold it to him—I don't remember his name, but he was a big, well-grown-up, fellow, I remember. I have been in the drug business continuously in various capacities ever since 1893. I have been on the road—sold pharmaceuticals on the road,—and have been in the wholesale business as a clerk, but mostly I have been in the retail business ever since. You ask when I first began to think back, and when my attention was first directed to this nickname for “Coca-Cola”; well, I don't know that I can answer that kind of a question. It seems to me that—I really don't understand what you want. I was first approached with reference to testifying in this case by some man who came to my place of business in Fort Worth about two years ago, and asked me if Bitting ever made “Koke” and I says “Not that

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I know of"—just talking—so he took down a few little dots. He was a friend of mine and I didn't think anything about it, and he went on away; so last summer there was somebody—I have forgotten who it was—came over and asked some questions. He was a lawyer from Fort Worth, and claimed to be representing the Coca-Cola Company, and asked me if I worked for Bitting. I [1445] told this person who called on me two years ago, that if Bitting made "Koke" it wasn't within my knowledge. Now, I say this, you must remember that has been more than twenty years ago, and as I now remember it, when I first went into the drug-store, being a green country boy right off of the farm, he might have made some things that I wouldn't know whether he was making ginger-ale, or "Coca-Cola," or what, but if he did I don't remember it. You asked if there was not a time that I do know that he was making a product and labeling it "Koke" on his bottles; no, it wasn't labeled, he was just experimenting, and as to how many times, or how much of that he made, as I remember, it was probably a quart, and he tried maybe to dispense it once or twice, but whether he had any name for it or not, I couldn't say. After he would hand it to different customers he knew real well, he would set it down and laugh and serve them real "Coca-Cola." You ask, what I suppose he wanted to get a label registered in the Patent Office for if he wasn't going to use it.

(Deposition of T. J. Haizlip.)

(Objected to by plaintiff as improper cross-examination. Overruled. Exception.)

I will tell you how that happened; C. B. Randall told him, "Billy, why don't you have that damned thing patented?" No, I didn't hear that. (Objected to by defendant as hearsay. Overruled. Exception.) Randall said "Billy, why in hell don't you have that thing patented?" He says, "Why?" He says, "Why, it may be worth something to you some day," and that was the beginning, as I understand, of Bitting thinking of having it patented. Now, this man [1446] who called on me two years ago and asked me if I had formerly worked for Bitting. I told him I had, and then he asked if Bitting ever made "Koke," and I told him that he did not within my knowledge. He asked if I didn't use to sell something that he called "Koke" which was a combination of cocaine and acetanylid. I said, "Yes, I sold a many a quarter's worth of it, but if I ever sold a drink called "Koke," I don't know it." I sold this preparation of cocaine and acetanylid to people who asked for "Coke," I would say a thousand times. They would come in repeatedly and say, "Give me a dime's worth of 'Coke,'" and, when they came to the prescription case and called for a dime's worth of "Coke" I had this combination in a box—he put it up himself—and I had it in a little bottle and dispensed it according to his directions; but when they came to the soda-fountain and got it, saying, "Coke" up there, then we dispensed "Coca-Cola." The substance of the conver-

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sation between me and this gentleman who called on me two years ago with reference to the drink that Bitting was making, was about what I have stated, that is about all of the conversation that took place at that time. The conversation which I had with the representative of the Coca-Cola Company about a year ago was about the same as that which I have just stated. Those are the only calls I have had with reference to testifying in this case, until I was called over here yesterday. My attention was first directed, and I was first asked with reference to the word "Coke" being a nickname for "Coca-Cola" just after I came to the office this morning, and when I arrived here. However, I had been knowing "Coke" ever since [1447] the first "Coca-Cola" that I ever saw which was sold by W. L. Bitting. I have heard the word "Coke" applied to the drink at various and sundry times and places all along ever since that particular time. The first time anybody ever asked me the meaning of the word "Coke" was when Lee McAfee come to my store to see me some two years ago. The truth of the business is, when I first went to work with Mr. Bitting in Sherman in 1893 he had never seen any "Coca-Cola" that I know of. He bought it during that summer of 1893, but when I first went with him there was no "Coca-Cola" in the store, and none had ever been sold in Sherman, and I had never heard of it. Bitting had the exclusive sale of "Coca-Cola" during that season only. The next year he was in Paris, Texas, and the next year after that

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he came back to Sherman and wondered why he couldn't have the exclusive sale again, and that was the time he experimented a little. The drink that he was making, whatever it was, was similar to "Coca-Cola." He intended to make "Coca-Cola," but he didn't have his formula worked out, and his customers wouldn't have it. I don't know whether he continued to make it or not. I left him in the spring of 1898 and have never worked for him since. Whether he ever done anything more about it or not, I wouldn't know, you see. I am not positive whether he was experimenting with the drink along about 1893 or 1894, I rather think that that was in 1896. I wouldn't give positive testimony about that because of the time back. It is a long time ago and it is hard to remember, but I rather think it was not in 1893, because he was satisfied with his surroundings at that time, and was having a reasonably good sale of the goods he bought and [1448] everything was moving all right, but after that when he felt he ought to have the exclusive sale again, he then experimented to some extent, but I don't know of him calling it "Koke" and I never heard of him calling it "Koke"—he may have, you understand. You say, this is not my absolute recollection; that it is what I say now that I think must have been; well, I cannot tell these things that far back and be specific. As my memory serves me, there were a few times that the boys would call at the store during the summer of 1893, and call for some "Coke" laughingly and jokingly, thinking

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it was something smart. I wouldn't be positive whether that was 1893 or 1896. I believe I could fix the date when that occurred within five years. I have been calling it "Coke" myself ten or fifteen years, I remember specifically and positively. I have been in Fort Worth ten years this next October, and I remember specifically and positively of going over here to Terrell and sitting down at a soda-fountain with a doctor friend of mine, and he called for "coke" and I asked him "Are you taking cocaine," and he laughed and says, "That boy knows what I want." Now, I happened to remember that because I just happened to be in the store and I was acquainted with this particular doctor friend. I have been calling for it as "coke" fifteen years. Yes, the word "coke" has a rather sinister meaning to it, like "dope." People use it as cocaine. They call for "coke" at my fountain even yet. I have customers who call it "dope"; some come to my fountain and call for "dope" and I have the boy to serve "Coca-Cola." I would say that the word "dope" was originally applied to narcotics—cocaine, morphine and such things, that [1449] is, the first time I heard it. I don't know whether that is true also of the word "coke" or not. I don't know anything about whether that is true or not. I don't know anything at all about why people apply this word "dope" and "coke" to "Coca-Cola"; I have no right to suppose anything on that line. Whenever a man came to my fountain and said, "coke," I inferred that he meant "Coca-Cola," be-

(Deposition of T. J. Haizlip.)

cause it was said—I don't know whether it is true—that it has cocaine in it. My idea as to why they thought it had cocaine in it is because it was in the newspapers,—the press gave it out that the United States was not going to allow the soldiers to use it—that is the only reason that I know of,—for the reason that it showed a percentage of cocaine. There was an article in the paper some several years ago that the Government was not going to allow the soldiers to use it any more on that account, and finally it blew over and that has been long done. I don't know where it originated, or whether there is any foundation for it, but we all know they have accused “Coca-Cola” of being doped and when we apply “dope” we think of cocaine and morphine—opiates, things of that kind,—that is my idea of it. Oh, yes, when I heard this drink called “Coca-Cola,” that name conveyed to my mind the idea that the drink had coca in it,—coca leaves. (Plaintiff objects to the question and answer as being improper cross-examination and not called for by the direct examination, and moves to strike the question and answer; objection and motion overruled. Exception.)

Yes, sir; as a druggist I also knew that cocaine came from coca leaves. (Plaintiff objects to the question and answer for the same reason and moves to strike the same; [1450] objection overruled. Exception.)

I have never dispensed any of the other cola

(Deposition of T. J. Haizlip.)

drinks. (Same objection and motion by plaintiff. Overruled. Exception.)

I bought some "Fan-Taz," but I have never bought any other "coke" or "dope" or "cola," or any of these things. I have had them offered—there is not a month during the season that I have not an opportunity to buy those, but I didn't buy them for the reason that I felt I was satisfied with the margin I was getting out of the other, and maybe the customers would think I was trying to flim-flam them, or something, so I just went right on and sold them "Cola-Cola." I have never tried to dispense any of the other beverages, but I have drunk it at the other soda-fountains. Yes, I know the different names by which the public, the consuming public, asks for these other beverages; they usually call for "Coke," I think. Yes, they call for all of them as "Coke," and put them all in the same class with "Coca-Cola." You ask why I think that, and if it is because I think these other beverages are doped up too; well, in my opinion—I am only giving my opinion, as a matter of fact: that is as far as it goes—when they are calling for "coke" or "dope," they are thinking of "Coca-Cola." The reason why I say that is because I have been selling "Coca-Cola" ever since 1893, with the exception of possibly two or three years that I was not in the retail business and during all of that time people, as a rule, when they called for "dope" and "coke" and all these—sometimes they would come in and say "Give me a shot"—well, I served them "Coca-Cola," and, to my mind that, is what

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they have in mind [1451] when they call for any of these things; now, I may be wrong, but that is my version. That is my opinion, because I have handled nothing but "Coca-Cola" all the time; and dealt in that product exclusively.

The other products are very similar to "Coca-Cola," if I understand it correctly; in other words, personally I cannot tell the difference between them. No, I don't think that the public has the idea that the other drinks are made pretty much in the same way, or made out of dope, too. To my mind, ninety per cent of the public who call for "dope," "coke," "shot," and the like, don't know but what it is all original "Coca-Cola," and don't know there is another drink like that being manufactured. I have never made any tests to ascertain just what they do mean, but a short while ago my druggist walked out to serve a man a drink who had asked for a "Coke" and the druggist, to get it right, asked, "Do you mean 'Coca-Cola'?" and the man said, "Don't get fresh with me, go ahead and serve me," and the young man undertook to explain there was a "koke" on the market, but he got very indignant and said he didn't come in there to be jollied by a soda jerker; he wanted to be served and said he was busy, and went on. I thought I would step up and explain to him about it, but I thought it over and decided he must be a fool and that I wouldn't talk to him. No, it is not well known that my store handles "Coca-Cola" exclusively and none of these other beverages, that I know of; I don't advertise anything to that

(Deposition of T. J. Haizlip.)

effect. In fact, I don't advertise it at all. I have, however, a "Coca-Cola" sign on my door. You asked why I suppose people would apply the name "dope" to one dope and not apply it to all the other dopes; well, I have an idea they apply it to all [1452] the other dopes. Yes, they put them all in the same class, if they know there is another dope. I know people who would come in and say—if they asked somebody to take a drink—"Do you drink 'Coca-Cola' or do you drink 'Koke'? Well, it's all dope, anyway,—what's the difference? So go ahead, I'll drink with you." The fact of the business is, a few of the people don't care what they get, so long as the drink produces the effect which these cola drinks produce, but a majority of them, I think, prefer the original "Coca-Cola." You asked what difference it makes to them if they cannot tell the difference in the taste; that is for them to answer. I don't know why, but I know they feel very friendly toward that,—perhaps because of the trademark, or something—those who know—but those who don't know feel perfectly satisfied. I drink it myself and feel satisfied. No, sir, I do not have any advertising in my place asking the public not to ask for "Coca-Cola" by nickname; but to ask for it by the full name, and have never had any advertising of that kind, nor have I seen any advertisement of that sort. Yes, I have seen "Coca-Cola" advertised in the papers asking the public to "Demand the genuine by the full name, nicknames encourage substitution," but I have no advertisements in my store for

(Deposition of T. J. Haizlip.)

anything, I don't like it. I am not positive whether I have seen "Coca-Cola" advertisements, "Demand the genuine by full name and avoid disappointment," or "Demand the genuine by full name, the wise do likewise." I wouldn't be positive whether I have seen "Coca-Cola" advertising anywhere in which the public are urged not to ask for "Coca-Cola" by any other name, but to ask for it by its full name, "Coca-Cola." I have a "Coca-Cola" [1453] advertisement on the wall of my building, for which I get paid. I have had lots of people to come into my store and ask for "coke,"—I don't know whether they called it "k-o-k-e"—but I have lots of people to ask for "coke." I have had people to come in and ask for "coke" and demand "k-o-k-e." They were working for the Koke Co. There was a lady one evening came in and I served her myself. She says I want "Koke," and I served "Coca-Cola," and when I went to serve this "Coca-Cola" at the table, she says, "Is this 'Koke'?" and I says, "No, Ma'am, we have no 'Koke,' but 'Coca-Cola.' " And she says, "I didn't ask for 'Coca-Cola,' I asked for 'Koke.' " I says, "I beg your pardon, but we have not got it." She says, "You might have said so." Incidentally, in a few minutes I found out she was working for the "Koke" Company, and that was one time in my life Koke was demanded of me. That occurred in my drug-store at Forth Worth last summer. I don't know who the young lady was.

When I was working with Bitting in 1893, W. L. Bitting and H. G. Bitting and myself were, I think,

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the only clerks about the store at that time; I don't know of anybody else ever dispensing cola drinks during the time I was with the firm. Well, now I don't know what nicknames the public commonly apply to other cola beverages at the fountains where they are served, or what beverage they want when they ask for "coke" and "dope" at other fountains. I have just taken the version that when a man says "coke" or "dope" he means "Coca-Cola." I may be wrong. I have handled "Coca-Cola" exclusively, because I thought it was good business to do so. I have had a drug-store of my own nine years last October. Mr. Andrews, who was associated with Bitting, died here in Dallas. I have no contract either with the Coca-Cola Company, or with the jobber; I buy where [1454] I please; I don't ever enter into contracts at all. I never have gotten any rebate at the end of the year, because I don't sell enough of it. I understand the Coca-Cola Company has an agreement providing that if you agree to buy as much as one hundred gallons through the season, they will rebate you to where it will cost \$1.50 per gallon. The "Coca-Cola" salesman put such a proposition up to me. I pay \$1.50 a gallon for my "Coca-Cola," although I don't use the quantity required to get that rebate. I don't know what price their customers pay who use a larger quantity and get the rebate, but I understand they get a discount. I will correct what I said a while ago, I pay \$1.65 per gallon. Yes, the "Coca-Cola" people have shown me the contract they wanted me to sign so

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as to induce me to get the rebate. Well, no; no, I don't know about that; I know different salesmen have come and asked me—I don't know that I have had one this year—and ask for my “Coca-Cola” business. I understand that it costs \$1.65 in barrels, and, if you sell as much as one hundred gallons during the season the rebate is fifteen cents per gallon. I know it is not a part of that contract that you are not to handle any of the other cola beverages. I have not seen the contract. They pull them out and lay them on the counter, but I don't read them, but that is my understanding. I cannot make a positive statement about it, but it is my understanding that, if you use as much as one hundred gallons, at the end of the season that they will give a rebate to an amount that will make the “Coca-Cola” cost \$1.50 per gallon. That would be about two barrels that I would have to use to get the rebate. I rarely use that much in my concern, therefore, [1455] I don't sell a great deal of “Coca-Cola.” I am pretty sure that I have not sold as much as two barrels a year. I have never heard the “Coca-Cola” salesman or representative say anything about any of the other cola drinks. No, sir; I have never tried to sell “Koke” myself; I have never bought it. [1456]

**Deposition of W. D. Smith, for Plaintiff
(In Rebuttal).**

W. D. SMITH.

Direct Examination by Gen. CRANE.

I am the editor of what is known as the “Weekly

(Deposition of W. D. Smith.)

and Monthly Pitchfork," of which I have been editor since it started, nearly eight years ago. My friends have spoken of an article which appeared in the "Pitchfork" on April 24th, 1912, containing an article criticising the substitution of "Koke" for "Coca-Cola" by the dispensers at various places. I remember having written such an article, and, in fact, two or three of them. You ask how I happened to write the article—whether it was at the suggestion of the Coca-Cola Company, Mr. Candler, or anybody for either of them, or whether it was on my own initiative, or my own motion. (Objected to by defendants because the question is leading and suggestive; overruled; exception.) May I be permitted a little latitude, in answering that in my own way? I feel I am due a little latitude, because the very fact of my being summoned here is rather an insinuation that I might have been paid for it and that my convictions might be for sale, and, of course, I resent such implication as that. I wrote that article, and one or two articles on the same line, prompted only by the most conscientious motives, and it is in general line of my editorial policies. My paper is not a newspaper, it is a paper devoted to my own editorial comments, and I comment as I please, and, occasionally, I jump into some things that I don't think are exactly right,—morally right, etc. I didn't think the conduct of the Koke Company was in line with the best moral or commercial ethics and I wrote an article attacking them for the same reason that I wrote an article attacking the fake spearmint gum

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people here last October— [1457] namely, because I considered it commercial vandalism. The article was inspired by nobody on the face of this earth. I wrote it because I felt like I ought to write it, and I wrote it like I thought it ought to have been written. That article was not paid for by anybody, I don't get pay for my editorial papers.

Cross-examination by Mr. LITTLETON.

I have carried "Coca-Cola" advertising in my paper about six years. I have never had any "Koke" advertising in my paper,—I should say not. You ask if I am not a lawyer; I think that is impertinent. I am trying to live right. I don't see why you should ask me any such question. You say that you don't think it is a reflection on anybody that he was once a lawyer, and you ask if I consider that a reflection; some kinds of lawyers, I do; yes, sir. You ask if I consider it a reflection to be the kind of lawyer that I was; I think I was a pretty good lawyer; I was good enough to quit; I never saw anything to it. If I am forced to answer, I will have to admit that I practiced law. No, I didn't belong to that class of lawyers that it is a reflection to admit that they were that kind of lawyer; I belonged to that class of lawyers that was decent enough to quit it. I found—if your question is relevant—I found that, as a young lawyer, the better class of lawyers, the older lawyers, had gotten the better class of business, and, in order for me to live, I would have to do more or less shystering, representing clients that I couldn't conscientiously represent, so I quit and

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went to work for a living. No, sir; I didn't know anything about the "Koke" [1458] business before it started here; neither did I know how long they had been in the business; nor did I know whether or not they had preceded "Coca-Cola" into the field. If as a matter of fact they had preceded "Coca-Cola" into the field, and had adopted the name of "Koke" for their product prior to the time the Coca-Cola Company had adopted the name "Coca-Cola" for its product, I certainly would still have considered that they were a fraudulent scheme, for the reason that advertising is an asset—there is no more valuable asset to a man or business than a good name,—a well known, good name,—which "Coca-Cola" has succeeded in achieving or acquiring for itself by much effort and by the expenditure of much money; and the Koke Company may have been here ever since Noah's Ark, for all I know, but they certainly had not gone to the trouble to advertise themselves and make themselves known, and, whether they antedated "Coca-Cola's" existence or not, it was plain to me they were attempting to steal the Coca-Cola Company's good name. I am not trying to argue the "Coca-Cola" case into the record; I am trying to get you to see the infamy of the thing. I first learned of this infamous scheme being perpetrated on the good people of Texas when these soda-fountains commenced stealing from me,—taking my nickel for a product that I didn't call for. As soon as I tasted the substitute I knew it wasn't "Coca-Cola. I could tell right off that it wasn't "Coca-

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Cola.” I certainly could. It fooled me the least bit—it is a tolerably fair substitute—but anybody who knows what “Coca-Cola” is can readily tell the difference. I don’t believe I ever did see any advertising of the Coca-Cola Company advertising a product by name “koke” or “dope.” I have been making [1459] attacks on such products as “Spear-mint” and “Koke” for eight years, and I have developed quite a “rep.” along that line. No, sir, I was never a preacher, and am not a minister now,—I am sort of a preacher, educated for the ministry. I have been conducting this “Pitchfork” ever since I quit practicing law. You say that you notice in this article which I wrote in the “Pitchfork” that I refer to a number of dealers who, I said, were handling “Koke,” and you asked how I found out how those people were handling “Koke”; well, I don’t believe it is necessary,—I don’t believe you can force me to tell how I find out what I know. I have a few ways of my own of getting information—it is one of my assets as a publisher. I refuse to answer that question. I will refuse to answer that question as to how I got my information. I don’t think it concerns either side of this case, whether a little bird told me, or whether my mother-in-law tipped it off to me. I believe it is sufficient for me to know it. I am not going to tell you unless I have to. I am not ashamed of the way I found it out. I am satisfied you would like to know how I found it out; I would like to know how a lot of things going on in this town right now, but I cannot find out; the people who

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know won't tell me, and I will have to pursue some other tactics. I still decline to answer your question; I think it is impertinent. I am satisfied you don't care what I think about it. I certainly do decline to answer it. I have already told you positively that I am not going to tell you my system of acquiring information—you think I am going to admit I have got a sleuth or a brace of private detectives? You ask if I have, as a matter of fact, got a brace of private detectives [1460] going around to ferret out the evils in my community for me to spread broadcast in my "Pitchfork"; not regularly paid detectives; I am in touch with several agencies. No, sir, not the Pinkerton's. I never have had anything to do with the Pinkerton's. I have had a lot of dealings with the W. J. Burns people. I refuse to answer that question as to whether or not I have had dealings with them with reference to these particular "Koke" people. You might put Mr. Dan Lehon, in charge of the New Orleans office, of the W. J. Burns agency, on the stand. I discovered the awful iniquity this Koke Company was perpetrating on the people of Dallas and surrounding country two or three, or four years ago, about the time I wrote the first article on them—this article you have reference to here was not the first article, I think I had written an article or two previous. I don't think I have the files of my paper back from the time I begun, some of them having been destroyed. I always try to keep a file, but I have been interrupted a time or two and my file has been broken. I would

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be very glad to make a search of my files to see if I can find the other copies containing the other articles that I wrote about "Koke." The article you have seen is in line with the other articles, the general idea being that the "Koke" people are attempting to use the nickname usually applied to "Coca-Cola."

If it is of so much importance, I will tell you on the quiet, how old I am—I would rather you wouldn't say anything about it; I am trying to keep it from my wife—thirty-one years old; I don't know what she would do if she found out that I am thirty-one years old, she would probably [1461] make me drink "Koke" all the rest of my life.

You again ask how I got my information that the places I referred to in my article in the "Pitchfork" were not handling "Coca-Cola," and you say it strikes you as a little peculiar that I would be hiring detectives to look into affairs of the Koke Company for the purpose of exposing them in my article, and that no doubt I spent my own money to get up this information; I see your point, and I will state categorically that I never spent a dime in getting my information regarding "Koke." I never attacked in my paper any of the other cola drinks that are on the market. The fact is, since I have been running my paper the only substitute I have run across for "Coca-Cola" was "Koke." All the people in Dallas who serve "Koke" are crooked dealers to that extent, without a doubt. I want to say this about Mr. Sanger, of Sanger Brothers. I am under no obligations to Mr. Sanger, but I have always considered

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him to be a man of unimpeachable integrity, and I personally have felt very badly over finding that he was substituting. I won't say that Mr. Sanger is a crook or a crooked dealer; what I say is that if he was aware of the injustice he was doing the Coca-Cola Company, and the injustice he was doing the "Coca-Cola" drinkers—myself,—by imposing on me that way, and taking my nickel and giving me a product that I didn't want, if he knew that—get the "If," please, he acted as a crook and to that extent, is crooked.

I never heard of anybody call for "dope" for "Coca-Cola." I am not aware of the fact that "dope" is ever used as a nickname for "Coca-Cola"—it may be though I cannot imagine why it should be used as a nickname, there is no [1462] earthly reason at all why it should be used that I can understand. "Koke" is a sort of alliteration between "Coke" and "Coca-Cola." I can understand why it should be used as a sort of abbreviation. Oh, yes, yes, I have heard of a cocaine fiend,—I have seen them,—and I have heard them referred to as "coke fiends," but I never associated the two terms at all. As I stated a while ago, I never heard the word "dope" applied as a nickname for "Coca-Cola," but "Koke" is the first syllable in the first half of the term "Coca-Cola." It is plain to see why it could be used as an abbreviation. You ask who all I have talked to about this contest between the Koke company and the Coca-Cola Company; why, I talked to President Wilson about it, and Mr. Bryan— You

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caution me that I am swearing and am under oath now; well, I take it for granted, of course, you are joking with me. I had a few words with Gen. Crane in his office just before I was put on the stand here. I believe I had about thirty seconds' conversation with Mr. Edward Crane last evening when I was summoned to appear. I don't remember that I ever talked to him about it; the conversation was of such small consequence I don't remember it. I believe, Gen. Crane, you called me up a month or two ago and asked me if I had a copy of a paper in which the article appeared, and I told you I didn't, and that was the last of that. Outside of that, now, I don't remember a thing. No, sir; I have never talked at any time, either prior to or since, the publication of the particular article which has been put in evidence as an exhibit, and the other article which I will produce and file, with any representative of the Coca-Cola Company with reference to the competition, or the character of the competition, between [1462½] Koke Company and the Coca-Cola Company. I have talked several times with my personal friend, Dan Candler, the local manager of the Coca-Cola Company, about the imposition of "Koke" on the market. No, Mr. Candler did not tell me about all these fraudulent schemes the Koke Company perpetrated on the public. I told him more than he ever told me. I think I can find out a few things that he cannot find out, because that is my business—my business is to find out things, and his is to manufacture. I told Mr. Candler several things, gave him several pieces

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of information, just as I would tell you if I thought you were being imposed on and you were my personal friend. It is due of one friend, to another, if I understand friendship. In all the rounds that I have made in attempting to acquire information with respect to the Koke Company and the Coca-Cola Company, I have never run across the word "dope" at all. I have heard "dope" used as a slang phrase for morphine and such as that. You ask if I did not refer to "Koke," in that article I wrote, as a "dope," and if I did not call it a "vile dope," and you ask if that was a gratuitous slander of the beverage on my part; Oh, I probably referred to "Koke" as a dope in the same slangy, playful way that you indicate that "Coca-Cola" is referred to as "dope" in other parts of the country, without any intention of slandering "Koke." I imagine myself going a long way to say awful nice things about "Koke" and the Koke people. I still decline to answer that question you asked about where I found out what concerns were handling "Koke" and those that were not handling "Coca-Cola." (Defendants except to the entire deposition of this witness and move to strike same, unless the witness answers the question propounded to him; overruled; exception.) [1463]

Redirect Examination by Mr. CRANE.

I made an error a while ago in stating who first mentioned this matter to me about my testimony in this case. I didn't do my whole duty in answering the question. It was because I inadvertently forgot to tell all of what happened. I believe Gen. Crane

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wrote me a letter and asked me at my first convenience to drop around to his office, and stated that he wanted to see me. I came around and he asked me to tell him if the article was requested by anybody, or if I wrote it of my own volition, and I told him that I did. [1464]

**Deposition of J. M. Penland, for Plaintiff
(In Rebuttal).**

J. M. PENLAND.

Direct Examination by Mr. ROGERS.

I am thirty-eight years of age, and am a wholesale druggist located at Waco, Texas; the name of my firm is the Waco Drug Company, of which I am President. I started my career in the drug business in 1894 at Whitewright, Texas, in the retail drug business, from which place I went to Sherman, Texas. I think I went to Sherman about April or May, 1898, and I stayed there one year. While there I worked for W. L. Bitting, as a prescription clerk. Mr. Bitting had a soda-fountain which I, at times, attended. I saw Mr. Bitting at that fountain dispensing "Coca-Cola," and I dispensed it myself. It would be hard for me to say just what names the people used at that time in asking for it—they used "Coca-Cola." "coke" and "dope." At that time if people asked at the soda-fountain for a "coke" I understood they wanted "Coca-Cola."

(Objected to by defendants, because not proper rebuttal evidence. Overruled. Exception.)

In response to request for "coke" I personally

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gave "Coca-Cola" to customers at Bitting's fountain in Sherman, Texas, in 1898 and 1899. I identify the gum label reading as follows: "KOKE, 1 ounce, W. L. Bitting & Co., Druggists, East Side Square, Sherman, Texas," which is filed as Plaintiff's Rebuttal Exhibit No. 79. I have seen such label used at the store of W. L. Bitting, at Sherman, Texas, when I was working for him during the period that I have mentioned. Those labels were applied to a mixture of cocaine and acetanilid crystals that were dispensed to habitual users of cocaine. No, sir, [1465] that was not used as a beverage; it was not a liquid at all, it was crystals. We dispensed it in what was known as pill-boxes, and we have a little thin label pasted on the box. I never heard of Mr. Bitting making a beverage, or syrup, and applying the name "Koke" thereto. I had an interview with a man named Moore, representing the Koke Company of Texas,—I think it was in the spring of 1913,—in my office at Waco, Texas. Mr. Moore came into our place and solicited our business, wanting us to act as distributors for the Koke Company of Texas, and made us a price of \$1.25 per gallon to any of our trade on direct shipments, or to us for our stock, and he offered as his argument for our handling it, that they were in position to give us this price because they were not doing any advertising, that the average person who called for "Coca-Cola" used the word "coke," and that they would get the benefit of the advertising done by the Coca-Cola Company, and that the retail man could conscientiously justify him-

(Deposition of J. M. Penland.)

self in dispensing "Koke" on such orders or on orders that he thought was intended to be "Koke."

(Objection by defendant and motion to strike on the ground that this is not proper rebuttal testimony and that no foundation was laid for any such evidence in the cross-examination of defendants' witnesses; overruled; exception.)

Yes, sir; something was said by Mr. Moore concerning the resemblance between the product "Koke" that he was offering me, and "Coca-Cola." He said that it was the same as "Coca-Cola." He went further and stated that the man who invented "Coca-Cola" had fallen out with the Coca-Cola Company [1466] and that he was their chemist doing their manufacturing.

(Same objection and motion by defendant. Overruled. Exception.)

Cross-examination by Mr. LITTLETON.

I have owned my drug-store since it was organized in 1911. I have been in the drug business since 1898. I have not owned a drug-store of my own all the time since then. When I quit Mr. Bitting, I bought a retail drug-store at Whitewright, Texas, and was there for about five years engaged in the retail drug business. As I remember, W. L. Bitting didn't make any special preparation outside of "Koke"—I mean by that he made all his tonics and such other things as are usually made in retail drug-stores. He did not, to my knowledge, make anything to dispense at the soda-fountain. At the time I was there Earl Stevens

(Deposition of J. M. Penland.)

and Hubert Bitting—a nephew of W. L. Bitting, were working there, also.

I understand the word “dope” to mean anything that is inferior to the genuine article. If a man is manufacturing, say, a high-class kind of goods, and another man is putting out inferior goods at greatly reduced prices, I would say it was dope, class it as dope. Yes, I am acquainted with the fact that there are various drinks on the market similar to “Coca-Cola,” I know that there is. Yes, sir, I class those drinks as “dope,” most of them. You ask if that is a common designation of those drinks that are similar to “Coca-Cola.” No, I don’t say that I would,—I don’t say that I am familiar with them,—I am not familiar with their method of doing business. I don’t know that I would class all of them, because I don’t know about [1467] them, but the ones I do know about I would class a dope, yes, sir; according to my meaning of the word.

(Objected to by plaintiff because not warranted by the direct examination. Objection overruled; exception.)

I have considered the word “dope” with reference to drugs and narcotics, and in that respect it means morphine or cocaine, usually, or gum opium, or anything that is used as a narcotic by fiends. To me the “coke” has a similar meaning, because they use it instead of cocaine. I have heard of “coke fiends.” The term “coke-fiend” means a coke-fiend in the sense you probably mean—it may mean a fiend who drinks “Coca-Cola.” I am not a man who

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drinks a good deal of it, but to me it would mean using cocaine. I don't know that I know how the name "dope" started, or why the public apply the name "dope" to "Coca-Cola." I have never heard that "Coca-Cola" contained any drug of any sort or any narcotic. What I heard was that it contained caffeine. I don't know that I ever heard that it contained cocaine. One of the drinks similar to "Coca-Cola" that I have heard of is "Lemon-Cola," which I have known for two or three years. With the exception of that, and "Koke," and "Coca-Cola," I don't recall any other. I have never handled any of these other cola drinks except "Coca-Cola." I have handled direct shipments of "Koke," and one or two direct shipments of "Lemon-Cola." Mr. Moore, of the Koke Company of Texas, turned in some orders from some of our customers for direct shipments to our account, and those accounts we handled indirectly. I did not agree to handle "Koke" when [1468] Mr. Moore called on me, nor did I agree to take orders for it. I don't think we ever sold over fifteen or twenty gallons of "Lemon-Cola." During the time I was working in the retail drug business, I never dispensed any cola beverage other than "Coca-Cola." No, I don't know the name people use in asking for these other Cola drinks in the establishments where they are sold. I know that they ask for "Coca-Cola" frequently as "dope" or as "coke," but I don't know the nicknames by which the public ask for the other cola drinks. I don't know whether they ask for those other drinks by "coke," "dope,"

(Deposition of J. M. Penland.)

“shot in the arm,” and these other names, or not. I have been a regular dealer in handling “Coca-Cola” all the time, and, of course, not having handled or dealt in the other cola drinks, I have not paid any attention to the other people handling the other trade in the other drinks; I have not had any opportunity to observe them. Not having dealt in any other drinks similar to “Coca-Cola,” I am, of course, not familiar with the customs and habits of the trade and customers, and the names they use in asking for those other different drinks in soda-fountains. I am not familiar with the preparations to any extent. I don’t know of the beverage that W. L. Bitting had, or which was made something similar to “Coca-Cola,” but which had rock candy in it, and to which he applied the name “Koke”; if he made any such beverage, I don’t know about it. He could not have made any such beverage without my knowing about it. While I was with him I never tried to sell any drink which he had there other than “Coca-Cola,” for “Coca-Cola.” Yes, sir, I get a rebate at the end of the year on the quantity of “Coca-Cola” I handle. I get twenty-five cents a gallon if I use over 2,000 gallons. Yes, sir; there is a rebate for a less amount. A contract regulating the rebate is made, but the contract is [1469] not necessary in order to obtain the rebate. We make a contract to try to tie the business to us, of course. I buy “Coca-Cola” with the understanding that if I sell so much—two thousand gallons—I will get this rebate. No, sir, we have no contract to the effect that we will not handle

(Deposition of J. M. Penland.)

any of these substitutes. "Lemon-Cola" was cheaper than "Coca-Cola." I don't think we would have made a better profit out of it than on "Coca-Cola." We would have made about the same profit. As I remember it, we would have made about the same profit on "Koke" as on "Coca-Cola," the only advantage being the fact that the goods were invoiced at the minimum price. The drink known as "Dr. Pepper" is still being sold in Waco. I do not know how long it has been on the market, but I have known of it fifteen or eighteen years.

I am not sure that I can tell you who first saw me with reference to my testimony in this case, but I believe it was Mr. McAfee. I don't know in whose behalf he came, but he asked some questions, but didn't take any testimony at all. That was about two years ago, I guess. The next person who saw me was some lawyer, I think, who represented the Coca-Cola Company. He got a statement from me at that time.

(Plaintiff's Rebuttal Exhibits Nos. 79, 80 and 81 were here tendered and offered in evidence.) [1470]

**Deposition of W. D. Smith, for Plaintiff (Recalled—
in Rebuttal).**

W. D. SMITH (Recalled).

Cross-examination (Resumed) by Mr. LITTLETON.

I could not find the other copies of my paper, "The Pitchfork," in which the other articles which I wrote about "Koke" appeared, although I have made diligent search for them. No, I am not convinced from

(Deposition of W. D. Smith.)

that search that they are not in my files. I found more copies missing than I thought were missing; it is possible I overlooked some articles as I went along. I will look for them again, and, if I find them, I will forward them to the Commissioner.

I am still disposed not to answer the questions which I refused to answer when I was on the stand before.

(Defendant's former objection repeated, and motion to strike the entire deposition was again made because the witness refused to answer the questions asked; overruled; excepted.) [1471]

(The following deposition was taken by plaintiff as rebuttal testimony at San Antonio, Texas, on June 5th, 1915:)

**Deposition of W. J. Garrett, for Plaintiff
(In Rebuttal).**

W. J. GARRETT.

Direct Examination by Mr. HIRSCH.

I will be sixty-two years old in November; I live in San Antonio, Texas. Yes, sir; at one time I worked for the Gregory Vinegar Company, of Birmingham, Alabama. Now, look here, you are going over a whole lot of questions, and I have already answered every one of them to that other man that came down here to see me. Yes, I once worked for the J. C. Mayfield Manufacturing Company. Now, I know all these questions were put to me by that man, they were answered. Yes, I worked for Celery-Cola Company, too; I was bookkeeper for that company.

(Deposition of W. J. Garrett.)

You ask if, during the time I was working for the J. C. Mayfield Manufacturing Company and the Celery-Cola Company, I ever saw any product around there, or any name around there, whether on the stationery, advertisements, drinks or otherwise, of "K-O-K-E" to the best of my recollection; well, that same question was asked and answered with this other gentleman. Of course, I didn't see anything of that sort; I didn't go down in the mixing-room; whatever things,—the different things he manufactured, or fixed up down there, come out in cases and were shipped to parties, and I was the book-keeper in the office doing the office work, and I wasn't doing the shipping, as I told you before, and I had nothing to do with it. I was connected with these companies from first to last between four and five years, commencing about 1903, or 1904, I suppose, somewhere along there. No, sir, I never saw "K-O-K-E" on [1472] any billheads, or printed in any way, shape, or form, to the best of my recollection,—not that I remember. I don't remember much about that business now, because I have been in other business since that for ten or twelve years, and that has all passed out of my mind; I don't remember it. I don't remember the name, or half the salesmen they had down there; it is a long time past.

Cross-examination by Mr. LITTLETON.

Oh, yes; it is quite possible that he might have made a product "Koke" and sold it as such. They made a good many different things back there, and he was always a great hand to be experimenting all along.

(Deposition of W. J. Garrett.)

I was the bookkeeper and didn't make anything back there, I just handled the books. [1473]

(The following deposition was taken by plaintiff as rebuttal testimony at Memphis, Tennessee, on June 7th, 1915.)

**Deposition of Mellville Rice, for Plaintiff
(In Rebuttal).**

MELLVILLE RICE.

Direct Examination by Mr. HIRSCH.

I live at Memphis, Tennessee, where I have been living since June, 1902. I am at present the accountant and assistant Secretary to the Board of Education of the Memphis Public Schools. I am thirty-six years of age. Yes, sir, I once lived at Birmingham, Alabama. I worked for the Celery-Cola Company, in Birmingham, I believe, in the summer of 1904, for about three or four months, as bookkeeper. J. C. Mayfield, Sr., was in charge of that company at that time as General Manager. During the time I was around there, to the best of my recollection and knowledge, I did not see or hear of a product by the name of "Koke," nor did I ever see any advertising or any labels, containing that word, nor did I ever see that word on any stationery around there, or on any of the books, or at any place whatever.

Yes, I was the defendant in the case of The State, vs. Mellville Rice that was tried in Birmingham, Alabama. I remember Mr. J. C. Mayfield, Sr., testifying in that case. I think he was sworn in that case. Attorney Ben M. Allen, of Birmingham rep-

(Deposition of Mellville Rice.)

resented me in that case. Yes, I remember the introduction of a letter in that case signed "Jack" to "Dear Judge." The original letter was introduced in evidence in that case and was present in Court. I heard Mr. Mayfield testify about it, and he admitted writing that letter.

(Objected to by defendants because the transcript [1474] of the testimony is the best evidence of what Mr. Mayfield testified about. Overruled; Exception.)

Yes, sir; he admitted writing that letter. No, sir, I have not got it, I think the letter was introduced by Mrs. Brown, who took possession after it had been read in Court. By introduced, I mean it was handed over to my attorney, that is all. Mrs. Brown didn't testify. She had no connection with the case whatever.

Cross-examination by Mr. LITTLETON.

This Mrs. Brown was Mr. Mayfield's former wife, Mrs. Diva Brown—it was told to me she was. She was present in the courtroom at the time of that trial, and I believe she did supply Judge Allen with the dope for his cross-examination—yes, sir—not all of it, but she gave him some information. She did not pay anything toward his fee in that case. No, sir, I never made a drink called "Caffa-Cola," I made no such thing, I was experimenting somewhat on my own account, with a drink which I intended to call "Caffa-Cola." Oh, yes, I had considerable stationery printed with that name on the heading, and that stationery was found in my room when the officers

(Deposition of Mellville Rice.)

went there—they found everything that was up there. I was bookkeeper there for three or four months, something like that, in 1904, but, after I quit being bookkeeper there, I moved to Memphis and have lived here continuously ever since. I remained in Birmingham until after the trial and then came back to Memphis. My trial occurred there and I was there a week or so after I left the employment of Mayfield—it was not a trial, it was *ex parte* [1475] evidence on the part of Mayfield. I did not take the stand in that case. No, sir, counsel didn't advise me specially not to take the stand. All I did there for the Celery-Cola Company was just bookkeeper, I posted up the ledger and things of that sort, that was the extent of my occupation.

Redirect Examination by Mr. HIRSCH.

While I worked there I went around the plant. The final disposition of this case of the State against Rice was that the Grand Jury failed to return any indictment as they were asked, and ignored the evidence that Mayfield had submitted, but on this preliminary examination or investigation they bound me over to the Grand Jury.

(The testimony as to the reason for the Grand Jury's action is objected to by defendants because, in the nature of things, it could only be hearsay; overruled; exception.) [1476]

(The following depositions were taken by plaintiff as rebuttal testimony, at Nashville, Tennessee, on June 8th, 1915.)

**Deposition of M. J. Handley, for Plaintiff
(In Rebuttal).**

M. J. HANDLEY.

Direct Examination by Mr. HIRSCH.

I reside at 1211 18th Avenue, Nashville, Tennessee. I have lived in Nashville about fifty-six years. I am in my sixty-fourth year. I was once connected with the Tennessee Carbonating and Supply Company. Really, I don't believe I could tell you about when that was, to save my life. I was so glad to get away from it that I tried to forget it—well, I guess approximately fourteen years, twelve or fourteen years ago. I knew the J. C. Mayfield Manufacturing Company at that time. The Tennessee Carbonating & Supply Company had a contract with the J. C. Mayfield Manufacturing Company for the supplying of their products known as, "Celery-Cola" and "Pepsin-Ola"—A ten year contract, as I remember. I was not the President of the Tennessee Carbonating & Supply Company at that time, but I was afterwards. I think I was Vice President at that time, if I remember correctly. The Tennessee Carbonating & Supply Company had a contract with Mayfield that they were to supply them with these two products. I never did know or hear in any way, shape, manner or form of the J. C. Mayfield Manufacturing Company handling, advertising, selling, or disposing of, or dispensing in any way, of "KOKE"—"K-O-K-E."

(Deposition of M. J. Handley.)

Cross-examination by Mr. LITTLETON.

The J. C. Mayfield Manufacturing Company made a number of other things that I did not buy. Now, I want to add [1477] one thing to what I have already said. We handled a product that he made called "Vig-O." But that I don't think was included in the contract and we handled very little of it. I don't know whether or not the J. C. Mayfield Manufacturing Company was as a matter of fact, manufacturing a number of different specialties, I couldn't say. We handled "Celery-Cola," "Pepsin-Ola" and very little "Vig-O." Of course, I don't pretend to say positively that the J. C. Mayfield Manufacturing Company was not manufacturing and selling a product by the name of "KOKE"; I don't know what they were manufacturing; but that is all I knew of. So far as I knew they may have been manufacturing a product called "KOKE"—maybe so. Now, I want to say another thing—when we first began the business it was on Market Street, and J. C. Mayfield had a laboratory in the rear of the building over there. Now, I noticed him ship the stuff out of there, but I never knew what it was—put it up in barrels and shipped it away and I never knew what it was. I couldn't say whether it was "KOKE" or not.

Redirect Examination by Mr. HIRSCH.

I don't think it has been over a year ago when I first heard of this product "KOKE" "K-O-K-E," if it has been that long. [1478]

**Deposition of Henry A. Skeggs, for Plaintiff
(In Rebuttal).**

HENRY A. SKEGGS.

Direct Examination by Mr. HIRSCH.

I reside at 1803 West End, Nashville, Tennessee. I have lived in Nashville thirteen and one half years. I formerly had a place of business in the Stahlman Building in this City, but I am not now conducting it—I have been out since April of this year. The nature of that business was cigars, tobaccos, soda and news, a light cafeteria and lunches. I handled “Coca-Cola” at my soda-fountain. In the five years I was in the fountain business I had one gallon of syrup that was put in my fountain. I don’t know whether it was—from the old Nashville Syrup Company, I believe. I wouldn’t say positively, but Perkins Baxter, the owner at that time, had been drinking “Coca-Cola” with me and he asked me would I try a gallon of that syrup. I don’t know whether it was Fletcher’s—it was an imitation of “Coca-Cola,” any way; and the salesman came up there and I took a gallon of the syrup which I served him when he called for it, but he didn’t drink but a little of it, and the rest of it was thrown away. At no time did I ever sell any syrup for “Coca-Cola,” other than “Coca-Cola.” With the exception of that one gallon at no time have I ever handled any other syrup similar in appearance to “Coca-Cola,” except “Coca-Cola.” You ask what drinks we served in response to orders for “coke” and “dope”; I don’t know that

(Deposition of Henry A. Skeggs.)

I ever served an order in response to "Coke," but when they call for "dope" I served "Coca-Cola." I understood it to mean "Coca-Cola" because when I called for "dope" myself that is what I expected to get—was a glass of "Coca-Cola." Yes, sir, Mr Brance Darden worked for me at one time. [1479]

Cross-examination by Mr. LITTLETON.

No, sir, I couldn't say that I was at my soda-fountain constantly all the time, but I was there a good portion of the time. No, when I wasn't there I couldn't know what my soda dispensers did when I wasn't there. I know one thing, however, they couldn't buy any stuff and put it in there and sell it without my knowledge and consent. I am not in any business at the present time. I went out of the soda business on account of ill-health—bad physical condition followed by rheumatism. [1480]

**Deposition of J. L. Herr, for Plaintiff
(In Rebuttal).**

J. L. HERR.

Direct Examination by Mr. HIRSCH.

I reside at Louisville, Kentucky, where I have lived all my life. I am twenty-nine years old. I am traveling representing of the Coca-Cola Company at Atlanta, Georgia. I cover Louisville, Evansville and Nashville. I was not in the place of business of Hearvy's during the spring of 1914.

Cross-examination by Mr. LITTLETON.

Well, I couldn't say just where I was in the spring of 1914. [1481]

**Deposition of John M. Kenny, for Plaintiff
(In Rebuttal).**

JOHN M. KENNY.

Direct Examination by Mr. HIRSCH.

I reside in Nashville, Tennessee, where I have lived about thirteen years. My business is bottling "Coca-Cola" in which business I have been engaged for twelve years. I am forty years of age. Yes, sir; I visited the Ball Park in Nashville during the years 1911, 1912, 1913, and 1914. I don't believe I have sold any "Coca-Cola" there since 1912, but we were selling it there in 1912. In the base ball season of 1913 and 1914, out at the Ball Park, I myself have heard calls for "Coca-Cola." In response to such calls "Star-Cola" was served. "Star-Cola" is manufactured by Diehl & Lord, whose plant is on Second Avenue North, Nashville, Tennessee. Yes, sir, I heard Mr. Diehl testify here in Nashville about a month or two months ago. He is the Diehl in the firm of Diehl & Lord.

Cross-examination by Mr. LITTLETON.

Yes, sir; I remember some specific instances where persons who called for "Coca-Cola" were served with "Star-Cola." My wife and myself were sitting in the Ball Park one afternoon in the grandstand, and there were three people sitting right across the way and the boy came by and they asked for three "Coca-Colas." I don't know who those people were. The boy just took the bottles of "Star-Cola," pulled the crowns off of them and handed them to the peo-

(Deposition of John M. Kenny.)

ple, and took the money. . I could possibly think up some other instances of the kind, but that is all I remember just at this time. Yes, sir, I saw advertising out there of "Star-Cola." They have got a sign board on the fence down there, Diehl & Lord, yes, sir. [1482]

No, sir, they do not advertise out there that they sell "Star-Cola" exclusively at the ball park. I have seen them advertise, though, but what they advertise out there is that the drinks are sold exclusively by Diehl & Lord. Diehl & Lord have never handled any "Coca-Cola" to my knowledge. They don't bottle "Coca-Cola." I am the only person in Nashville that bottles "Coca-Cola," and that fact is well known—I advertise that fact. [1483]

**Deposition of A. B. Quick, for Plaintiff
(In Rebuttal).**

A. B. QUICK.

Direct Examination by Mr. HIRSCH.

I am employed at the Regal Shoe Company at Nashville and reside at 1124 State Street. I have been living in Nashville about sixteen years, and am thirty-one years of age. Yes, sir, I visited the place of business of Fried and Haas in Nashville, which used to be at the Transfer Station where they were at the time I called on them. I don't remember the exact date of my visit. I would say it has been about six months ago. Yes, sir, it was somewhere around October, 1914. Mr. Friend went with me. On my first visit to that place I went in and called

(Deposition of A. B. Quick.)

for a "Coca-Cola," I believe, or a "dope," and Mr. Friend went with me and he called for "dope." I called for "Coca-Cola," I think,—I don't remember exactly—but they drew both of them out of the same container, unlabeled. You asked if both of us called for the same drink using the same name, or different names; we used different names. Yes, sir, one of us called for "dope" and one for "Coca-Cola." The syrup used to make both drinks was drawn from the same container. After we made these calls for the drink we bought enough "Coca-Cola" syrup,—at least it was drawn out of the container for "Coca-Cola,"—to make, I think it was—eight or ten glasses of "Coca-Cola." In purchasing that syrup we asked for "Coca-Cola," and it was drawn out of the same container as the drinks served us previously had been drawn from. He wanted to put some water in that syrup, but I wouldn't let him do it. This syrup was put into a thermos bottle and then we went down to the basement of the Duncan Hotel and put it into two eight-ounce bottles. I think I must have put it into two eight-ounce bottles at that time,—I am not positive, one or two eight-ounce bottles, though. After [1484] putting it into those bottles, we carried it down to the Savoy Hotel and labeled it and sealed it. That is my signature on Plaintiff's Rebuttal Exhibit No. 82. I put the original of that on the bottle. Mr. Friend was present when I did it. As far as I know, Mr. Friend kept the bottle. After I put the label on there and we sealed it up, turned it over to him and don't

(Deposition of A. B. Quick.)

know what he done with it. No, sir, no change was made, nor anything done with the contents of the bottle from the time I had the dispenser at Fried and Haas to put it in the thermos bottle until after I put it in the one or two eight-ounce bottles. I had my hands on it until it was sealed. There was no change made at all. We went to the place of business of Fried & Haas several times on two or three separate days about the 21st of October, 1914. I called for "Coca-Cola" and Mr. Friend was with me. I would go in first and call for it, and, while I was standing there drinking it, he would come in and order one, and while he was drinking it I would ask for some syrup. I called for either "Coca-Cola" or "dope," I don't remember which one I called for. No, we did not both call for the same thing, we called for different things. I would call for "dope" and he would call for "Coca-Cola"—sometimes he would change it, you know. On the 21st day of October, or thereabouts, the drinks which we called for were taken from the same container every time, whether we called for "dope" or "Coca-Cola." I asked him for some "Coca-Cola" syrup, in fact, I did the asking all the time. We got some syrup on this occasion, also, which I put in a thermos bottle and took down to the Duncan Hotel, and then [1485] come to the Savoy and sealed it and labeled it. No change was made in the syrup. Yes, sir, I signed Plaintiff's Rebuttal Exhibit No. 83, that is my signature. Yes, sir, when I got this syrup I took it to the Savoy Hotel and put a label on it, and

(Deposition of A. B. Quick.)

turned it over to Mr. Friend. This is a copy of that label. No change was made in this syrup from the time the dispenser gave it to me to the time I sealed it. I called for "Coca-Cola" syrup on both occasions at the time I got those samples. Yes, sir, I asked the dispenser distinctly for "Coca-Cola."

Cross-examination by Mr. LITTLETON.

Yes, sir, at the time I made these rounds with Mr. Friend I was still in the shoe business; that was done during my lunch hour and of evenings. The way I happened to make these rounds with him is that I just met him, he came to the store,—a friend of mine brought him around there and introduced him to me, and I met him that way, and he asked did I want to go around with him, and I told him, yes. Yes, sir, I knew he was a detective of the Coca-Cola Company, he told me that he was. No, sir; he didn't say he wanted me to go with him to qualify myself as a witness in this case. He said he wanted me to go with him to help him. Yes, sir; he explained to me the nature of his work, and paid me for my services. I think he paid me something like seven or eight dollars for the whole time I helped him. I helped him for five or six days, something like that—five or six nights rather. These samples from Fried & Haas are not the only samples we got; we got samples from several other places. [1486] We got them at Warners, got them at Wommacks, and I think those are all the places. We got two samples in each place, making two visits to each place for that purpose. The distance between Warner's and

(Deposition of A. B. Quick.)

Wommack's is about four blocks. We went to one of them one day and another the next. In other words, I got about \$1.25 a visit. Yes, when we went into Fried & Haas place I asked for a "dope," and Mr. Friend asked for a "dope" or a "Coca-Cola," I don't remember which, one of us for one or the other, I don't remember which, either "Coca-Cola" or "dope," whatever I asked for, he asked for the other. I don't remember particularly whether at Fried & Haas one of us asked for "coke" and the other asked for "dope." Either "dope" or "Coca-Cola," I don't know whether he asked for "coke" or not. It was either "dope" or "Coca-Cola." I know whatever I asked for, he would ask for the opposite, and they were both drawn out of the same can, no label on it. Yes, sir; "coke" is opposite from "dope" and Friend might have asked for "coke" but I think he asked for "dope." I don't remember exactly the placement of the particular container from which the syrup was drawn on the first visit to Fried & Haas, but it was the same container both times we went there. I don't remember whether it was on the right or left of the carbonator arm, nor do I remember how far from the carbonator arm it was. It was drawn from the same container on each visit we made to Fried & Haas. I think we went there twice the same day. I think we went there one day at dinner-time and one time that same night, or day, or it might have been the next night, I don't remember about that. We made two or three visits there— [1487] two visits

(Deposition of A. B. Quick.)

there. I think the name of the dispenser on duty on both occasions was Ragan. Fried & Haas didn't have but one fountain at the Transfer Station. He has two fountains put together, both right there together, I didn't pay any attention as to which one it was we went to. There was one dispenser there, I think, I am not positive. I don't remember now definitely when I got this syrup whether I asked for "dope" or "Coca-Cola." One of them was "dope" or "Coca-Cola." I asked for one and Friend asked for the other. I am positive that when I got the sample of the syrup I asked for "Coca-Cola," not for "dope" or for "some of that same syrup." I know that because that is what I went in for. I went in there for "Coca-Cola." I asked for "dope" or "Coca-Cola" when I called at the fountain, but when I called at the fountain for the syrup to go in the bottle, I asked for "Coca-Cola" syrup. I did that because that is what I wanted. I went there to find out what he served from that spigot. I said I didn't know when I went to the fountain and called for the drink whether I asked for "dope" or "Coca-Cola," but when I asked for the syrup, I asked for "Coca-Cola." I couldn't swear which one asked for "Coca-Cola" and which one asked for "dope," because I don't remember, it has been some time ago. Of course, when I asked for syrup, I asked for "Coca-Cola" syrup and I know that it came out of the same can. Yes, sir, Mr. Friend was present with me during all the time I asked for these drinks. You say that you thought

(Deposition of A. B. Quick.)

I said a moment ago that I would go in and Friend would come in after I had called for the drink; he would come in while I was standing there drinking, then, while he was drinking his drink, I would ask [1488] for "Coca-Cola" syrup in his presence, and he would watch the container from which it was drawn, the same as I did. Yes, sir; I used to have a soda-fountain myself at which we sold "Coca-Cola" exclusively. I don't remember now whether that was the only cola drink we handled or not, it has been so long ago,—it has been twelve or fifteen years since I worked in a soda-fountain. I think Wayfield used to make a cola,—something like that,—we used to sell it there. He called it "May-field's-Cola," I think, as well as I remember, I don't remember about his selling anything like "Koke"—K-O-K-E. How did the label begin? Well, I was trying to think. About two or three days ago a fellow was talking to me about that—I know it was "Cola," that Mayfield used to make one. I don't remember what letter the name of his drink began with, whether it was with a "K" or a "C," but we handled the drink some twelve or fourteen years ago. We did not handle any other cola drinks besides that, that I remember, I couldn't say how long he handled that drink. The color of that drink was dark, on the order of cola. I was in the soda-water business at Page & Sims for about four or five years and at the Demovelle Drug Company two or three years.

(Deposition of A. B. Quick.)

(Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits Nos. 82 to 89, inclusive. Defendants object to Exhibits 84 to 89 of the above exhibits as irrelevant and immaterial.) [1489]

**Deposition of Alfred George Weber, for Plaintiff
(In Rebuttal).**

ALFRED GEORGE WEBER.

Direct Examination by Mr. HIRSCH.

I reside in Nashville, Tennessee, where I have resided since about 1883. I was 35 years of age the last of April. I am not engaged in any business now. I was formerly in the business of selling and dispensing soft drinks. I had a gentleman by the name of Brants Darden working for me when I was in business. I did not ever handle a product by the name of "Koke,"—"K-o-k-e"—that I remember of. I handled "Coca-Cola," pure and unadulterated.

Cross-examination by Mr. LITTLETON.

I was in the soda-water business in the Arcade. I bought that place, I believe, in 1906, and ran it I think about a year, as a cigar-store, and then put in a soda-fountain, which I had up until about 1910. I sold out the business entirely in 1910 to J. C. Matthews and Y. W. Hall. When I ran the business I handled straight "Coca-Cola." At one time there was a Mr. Mayfield who had some "Celery-Cola" there and left it for a short while—I did not handle it but a very little of the time at that—the "Celery-Cola" did not sell of its own accord, and there was not any chance to sell it as "Coca-Cola," so I just

(Deposition of Alfred George Weber.)

let the stuff go—I did not fool with it. No, I do not think I would have sold it as “Coca-Cola,” if I had had the opportunity. Yes, I just stored it at my place of business, you might call it that. “Jimmy” came to town here and he hung around my place a good deal, and he used to get a keg of the stuff in and go out around the town somewhere and sell it. [1490] I bought my “Coca-Cola” from Spurlock-Neel Company. I could tell you about how much I bought per year, I think, if I go to Spurlock-Neel. I know the January before I sold out I got a notice of either ninety-one or ninety-two dollars rebate on my Coca-Cola purchases for that year. I am not prepared to say how many gallons that would represent, because it has been some time since I have been posted on Coca-Cola rebates—I think about 750 gallons to \$90.00 rebate; I won’t say positively, you understand, but that is my recollection that I drew \$91.00 or \$92.00, somewhere along there—I know it is a pretty good-sized rebate. I never handled anything in the “Coca-Cola” line at my soda-fountain except “Coca-Cola,” and that “Celery-Cola” that time Jimmy had it there—I had that “Celery-Cola” separate down there. I only had one dispenser at a time. Now, in regard to this “Celery-Cola,” I had “Celery-Cola” advertised on the fountain—Jimmy had some advertising matter, and I had it on the fountain, “Celery-Cola.” Brants Darden worked for me shortly before I leased the fountain to Matthews, and then I got Matthews to keep him on, but he did not work very long for

(Deposition of Alfred George Weber.)

Matthews. They had a falling-out and he left them. I think he worked for me in 1910, the same year I sold out. He was the only dispenser I had at that time. I had one dispenser and myself and the negro porter; that is all that ever stayed in that little place. I had several dispensers at different times, but I am speaking about at one time, I just had one man. I do not know what Matthews was handling after I left there. He is in the syrup business now, but at that time he was not making any cola drink, I do not believe. Before I started this soda-fountain I ran a cigar-store, you know. That was just [1491] a year before. Prior to that I was on the road selling cigars. I was never in the soda-fountain business before that.

**Deposition of Robert F. Jones, for Plaintiff
(In Rebuttal).**

ROBERT F. JONES.

Direct Examination by Mr. HIRSCH.

I reside six miles out of Nashville on the Franklin Pike. I am employed by the Shurlock-Neel Company, and have been with them ever since they have been in business, which is about thirty years. I am cashier and head bookkeeper of that concern. Yes, I know the firm of Fried & Haas here. I think they are out of business now. Yes, sir; Spurlock-Neel sold Fried & Haas "Coca-Cola." I have the record of the sales Spurlock-Neel made to Fried & Haas during the year 1914, which was 471½ gallons; in 1913 Spurlock-Neel sold Fried & Haas 48 gallons;

(Deposition of Robert F. Jones.)

and I do not know for certain how much was sold in 1915. (Objection by defendants to all this witness' testimony, because secondary evidence, the books being the best evidence. Overruled. Exception.)

Cross-examination by Mr. LITTLETON.

I have no independent recollection, aside from the books, of how much "Coca-Cola" we sold our customers. I do not keep the books myself. I do not actually write out the items which we sell customers. I am the head bookkeeper. I do not make the records myself. (Defendants further object to this witness' testimony, because he knows nothing except from the records of the Company, and he did not make the records, and therefore does not know of his own knowledge that the records are correct. Overruled. Exception.) I do not know whether Spurlock-Neel Company have a regular jobber's contract [1492] with the Coca-Cola Company or not. Mr. Martin is the buyer for that department and he can give you the information on that. We do get a rebate, according to contract, or understanding, based on the number of gallons we have sold at the end of the year, and we got a rebate in 1914. Whatever understanding or agreement that was, we bought Coca-Cola under and pursuant to it during the year 1914, and this far during the year 1915. I could not tell you whether we handle any other cola beverage except "Coca-Cola," because I am not a druggist and I do not do the buying. We do not sell any drinks similar to "Coca-Cola," ex-

(Deposition of Robert F. Jones.)

cept "Coca-Cola," that I know of. The fact of the business is, I do not know whether we do or not, but I do not know of any, and I do not believe we do; still, I do not know about that. (By consent defendants withdraw so much of their objection as applies to the production of the books of the company, but stand on the rest of their objection.)

**Deposition of J. W. Huggins, for Plaintiff
(In Rebuttal).**

J. W. HUGGINS.

Direct Examination by Mr. ROGERS.

I am 46 years old and live at Murfreesboro, Tennessee. I am connected both with the Murfreesboro Bottling Works, and with the firm of Christy & Huggins. Christy & Huggins manufacture ice, handle coal, and transfer business; The Murfreesboro Bottling Works manufacture soft drinks. The latter concern has been in business since about 1902. The people who now own it succeeded the Murfreesboro Bottling [1493] Works, which was owned by other parties—they bought out the other parties. The business of these other parties was bottling soft drinks. At the time we bought them out we were manufacturers of ice. We took over the soft drink business, that was in 1902 or 1903. We did not buy these parties all out at the same time. We bought them one at a time, consequently it went from 1902 to 1903. We made different trades with each individual. Yes, sir; the Murfreesboro Bottling Works—the one we bought out—and ourselves as succes-

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sors, bottled soft drinks. We bottled all flavors, such as lemon-sour, strawberry, chocolate. No, sir; we did not bottle "Coca-Cola." We did bottle, however, what we took to be imitations of "Coca-Cola—we were competitors of the "Coca-Cola" people. We tried to reproduce "Coca-Cola"—or did we try to get the right? Yes, we tried to get the right from the "Coca-Cola" people; we were refused, and we tried Mr. Kenny, the Nashville bottler here. We offered him money to buy the right, but somehow or other they would not let us have it. Upon that refusal we decided we had to do something to fight "Coca-Cola," as it rather had the bulge on us in business, and we got us up a word of our own and copyrighted it—a trademark—which was the word "Koke." The word we used was spelled "K-o-k-e." Now, we did try to copyright "C-o-k-e," too. We first started to use the word "Koke" in 1902 or 1903. We selected the word "Koke" because "Coca-Cola" was usually called "coke" by the drinkers—if I wanted a glass or a bottle of "Coca-Cola" I would say, "Give me a 'coke.'" Yes, that was true prior to the time we first adopted and used the word "Koke." [1494] Our first use of the word "Koke," before it was copyrighted—we used a diamond-shaped label, spelled it out with plain letters—I would call it a block letter—such letters as that—as the heading of that paper (referring to a copy of the Nashville "Tennessean." The paper referred to was offered in evidence as Plaintiff's Rebuttal Ex-

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hibit No. 90.) I could not tell you exactly how long we continued to use the word "Koke" in block letter form, but we probably used it until about 1905. When we went to copyright, or patent this word, we got up a design of our own—I made it myself. I drew it myself with pen and a peculiar kind of ink—I do not know, something that they said they would have to have that would keep. The label heretofore introduced in evidence as Defendants' Exhibit No. 24, reading as follows: "Bottled by authority of Murfreesboro Bottling Works, Murfreesboro, Tennessee," around the periphery, and, in the middle, the word "Koke" in script with two flourishes, is the design I first drew—there is no doubt about it, sir, in my mind. That is undoubtedly the design of the word "Koke" which I, myself, drew. We used that to compete with "Coca-Cola," and we put it on different drinks. We used to buy from H. K. Wampole & Company of Philadelphia, I believe, in syrup form by the barrel, a syrup that they called "Nervola," which we used more than anything else, and then we, ourselves, mixed some syrups that we used this name on. We applied for registration in the Patent Office for the word "Koke," as a trademark. The uncertified Patent Office copy of trademark registration No. 55,848, signed by Murfreesboro Bottling Works, by J. W. Huggins, Secretary, and sworn to by J. W. Huggins, is a copy of the registration [1495] to which I refer. (Plaintiff here offered in evidence the copy of the registration iden-

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tified by witness, as Plaintiff's Rebuttal Exhibit No. 91.) Yes, sir, I at one time had negotiations with a man named J. C. Mayfield with respect to the sale of this registration to him, or to one of his companies. Mr. Mayfield came to Murfreesboro to my place of business. Those negotiations resulted in the sale of that trademark to him—that is, the first negotiations—and a sale of a part of the territory that we covered. The Murfreesboro Bottling Works did not sell any "Koke" syrup, we simply bottled it. Ultimately a deal was consummated whereby Christy & Huggins and the Murfreesboro Bottling Works sold to Mr. Mayfield, or his company, this registered trademark "Koke." We only turned over to him the trademark—by that I mean the certificate that we received from the Government. (Objected to by defendants, because an attempt to vary the terms of a written instrument by oral testimony; and, because the written instrument is the best evidence of what was transferred. Overruled. Exception.) No formula was disclosed to Mr. Mayfield, or to the Koke Company of America for making this product "Koke." No business of any sort, and no asset, was turned over either by the Murfreesboro Bottling Works, or by Christy & Huggins Company. (Same objection by defendants. Overruled. Exception.) No list of customers was turned over to Mr. Mayfield, or the Koke Company of America, either by Christy & Huggins or by the Murfreesboro Bottling Works. Neither at the time Mr. Mayfield came to me, nor at

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any other time during the negotiations, nor at any [1496] other time, did he explain to me that he had ever used the word "Koke" as a trademark. He never mentioned such a thing. He never opened his mouth in connection with any use of the word on his part. I personally had the negotiations with Mr. Mayfield, and conversed with him in respect to this matter. Mr. Mayfield did not mention to me that either Christy & Huggins or the Murfreesboro Bottling Works had done any advertising. Mr. Mayfield's testimony in New Orleans that "I explained to them my long usage" (referring to his alleged use of the word "Koke") is not true at all; he never opened his mouth in that connection. I personally had the negotiations with Mr. Mayfield and conversed with him in respect to this matter. Mr. Mayfield's statement; "I knew I could win out in the courts, but I didn't care to do that, they had done some advertising, popularizing my "Koke" and finally I said, 'Let's see if we can get together on a business proposition'" (referring to the Christy & Huggins Company or the Murfreesboro Bottling Works advertising). Nothing of the sort was ever mentioned. The transfer of the "Koke" mark to Mr. Mayfield was made in two trades. The first trade was made without any correspondence, he was on the ground. In the next trade there was some correspondence. I identify the letter addressed to J. W. Huggins, Murfreesboro, Tennessee, dated November 3, 1914, signed "Very truly yours, J. C. Mayfield," which was filed

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as Plaintiff's Rebuttal Exhibit No. 92, and a carbon copy dated November 3d, 1914, which is filed as Plaintiff's Rebuttal Exhibit No. 93. Plaintiff's Rebuttal Exhibit No. 92, is a letter from Mr. Mayfield, writing me in regard to suits brought against his company and asking me if I could meet them in Chattanooga. Plaintiff's Rebuttal Exhibit No. 93, is a carbon copy of my reply to that letter. I am the J. W. Huggins to whom that letter was addressed. (Plaintiff here tendered and offered in evidence Plaintiff's Rebuttal Exhibits Nos. 92 and 93.) I can identify the letter on the letter-head of the Southern Koke Company, Limited, dated December 24, 1913, which is marked Plaintiff's Rebuttal Exhibit No. 95. That is a letter in regard to me sending him the papers. It is a letter written by Mr. Mayfield to Christy & Huggins. (Plaintiff here offered in [1497] evidence the letter referred to as Plaintiff's Rebuttal Exhibit No. 95.) I can identify the letter filed as Plaintiff's Rebuttal Exhibit No. 96. This is the finishing up—in regard to the winding up of the last trade between us, and asking me to send him the trademarks—the papers—the certificate. It is a letter from Mr. Mayfield to Christy & Huggins Company. (Plaintiff here offered in evidence the letter referred to as Plaintiff's Rebuttal Exhibit No. 96.) I can identify the three letters marked Nos. 97 to 100, inclusive. One of these letters is signed "F. G. S. Johnson," that was mailed to me by Mr. Mayfield. Those are genuine letters

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received by Christy & Huggins, or by me in the ordinary course of business. (Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 97 to 100, inclusive, the letters referred to.) I can identify the two crowns presented to me with the word "Koke" in script, in the middle, and, around the periphery, "Murfreesboro Bottling Works, Murfreesboro, Tennessee." They are trademarked "Koke." They were used by the Murfreesboro Bottling Company, but we had recently sold most of the interest to Mr. Mayfield. (Plaintiff here tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 101 and 102, the two crowns referred to.) These particular crowns, or crowns similar to these, were used by the Murfreesboro Bottling Works from about the year 1905 until about 1909. Referring to the label marked Defendants' Exhibit No. 24, I never did see the word "Koke," in the form it there appears in, before I made the design in script of that word as I have testified.

[1498]

Cross-examination by Mr. LITTLETON.

I tried to get the bottling rights to bottle "Coca-Cola" in 1902 or 1903. I do not know why I could not get the rights. They simply would not grant it. Yes, I think it was because the territory was covered by Mr. Kenny here at Nashville, and probably he was not willing to release that much of his territory. We finally succeeded in getting the bottling rights, and I am now a "Coca-Cola" bottler and have been

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since 1905. I have been bottling "Coca-Cola" continuously ever since 1905. We never bottled any more "Koke" after we got the contract to sell "Coca-Cola." We got the "Coca-Cola" contract in 1905—No, no, we never got the Coca-Cola contract in 1905, we got it in 1909. In 1905 we got the registration of the trademark "Koke." We did not get any contract in 1905 that I know of in connection with this. From 1902 up until 1909 I was in two businesses, one was Christy & Huggins Company, the other was Murfreesboro Bottling Works, the latter was a corporation. The Murfreesboro Bottling Works, as composed of Christy and the two Huggins, bought the Murfreesboro Bottling Works that already existed in 1902 or 1903—they did not buy all at once, as I explained awhile ago. They bought one party at a time, and continued as the Murfreesboro Bottling Works. Yes, I swore in my application for the registration of the word "Koke" that the trademark "Koke" had been used continuously in our business since about May 1st, 1902, and I think that is about true. I cannot say exactly when we started to try to get the bottling of "Coca-Cola," but right from the very [1499] start of our business we tried to bottle Coca-Cola. The first product we bottled and labeled Koke, was, I think, "Nervola," but we have bottled several different things that we branded koke—several of these different Cola drinks. What we got from the Nervola people was the completed syrup. It looked like Coca-Cola, and

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tasted pretty much like Coca-Cola. We took that product and bottled it and labeled it "Koke." Then we manufactured a syrup that we labeled "Koke," which we made from a formula that we were trying to reproduce Coca-Cola. We bought that formula from somebody, I think, in Florida. I do not remember his name. We made that product ourselves, from the formula that we got. We used an extract of coca leaves. Then we had Wampole to try to make us some syrup by this formula—Wampole of Philadelphia. This syrup that we made we percolated the coca leaves and got the extract out of it. The process which we followed was a very crude one,—we boiled it down just as you would tea in water, you understand, and got the extract, and then we would mix it and store it. We mixed it with several ingredients that we had—I do not know what the ingredients were—I could not repeat the formula, to save my life. I believe I could reproduce it. We would put the leaves in a big kettle, mix it all up and boil it all up together. I do not remember whether we put any alcohol in there or not. I could not say for sure whether we did or not. Yes, sir; we put caffeine in. This product that we made, we only tried that experiment one time, and that was a failure, so that as a matter of fact most of the time we applied our labels to this Wampole [1500] Company's product. This product that we made was just an experiment. We used up what we made, and made no more. Oh, yes, sir; we sold it, I think

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we sold it all. We were competitors of Coca-Cola and we had to fight it, and our idea in putting the label Koke on this Nervola, was to get in between the trade and Coca-Cola—if I wanted a glass of Coca-Cola, or a bottle of Coca-Cola, I would call for a bottle of coke, or a glass of coke. In other words, we just wanted to get this name and sell our product as a substitute for Coca-Cola. You asked why we did not just label it Coca-Cola; well, we had been threatened by these people once or twice on imitations of Coca-Cola; I did not think we had any right to use the word Coca-Cola. No, sir, we had not tried to use the word Coca-Cola before that, but went to them to get the right to bottle Coca-Cola. We expressed in a letter that we were bottling an imitation of Coca-Cola, and we wanted very much to bottle the real thing, and they immediately fired back at us that they had turned our letter over to their attorneys, who would attend to our case promptly. Thereupon we were afraid to take the name of Coca-Cola. We knew we had no right to use it without permission. You ask if I thought we had the right to use the name Koke; why, yes, I did not doubt that, I never did doubt that. I did not think that was anything like the name Coca-Cola in sound or appearance. As I stated before, that was our means of getting Coca-Cola business, and I will say as a rule the majority of people that want Coca-Cola in our section of the country call for [1501] coke. No, sir; I did not want to practice this fraud on the

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public. I did not consider it a fraud. We did not give them Coca-Cola. We really knew they wanted Coca-Cola, I would do it if I wanted Coca-Cola, I would call for coke. You say that we just adopted this name then, for the fraudulent purpose of passing off our product for Coca-Cola; well, I did not think it was a fraudulent purpose. No, sir; I did not want to pass it off for Coca-Cola, I passed it off for Koke, a substitute for Coca-Cola. Probably people did think it was Coca-Cola. You ask if it was my intention to pass it off for Coca-Cola; my intention was, when they called for Koke to give them Koke. You ask if my intention was to pass off on them our product, which we labeled Koke, as Coca-Cola; we used it as a substitute for Coca-Cola. We designed it, and intended it, to get the Coca-Cola trade, the trade of the people who drank Coca-Cola. No, sir; our intention and design was not to have this product of ours served when they asked for Coca-Cola and fool them—not when they asked for Coca-Cola—unless they asked for coke. Yes, I considered a request for coke, practically equivalent to a request for Coca-Cola. Well, I do not know that it is the same thing. You ask if I did not consider that when people asked for coke they were asking for Coca-Cola, and that my product would be substituted for it; that is about the size of it. No, I am not a self-confessed substituter; I do not know whether I can put it exactly that way—when they called for coke, I sold them Koke, believing that they wanted

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Coca-Cola—Yes, I did that myself, when I wanted Coca-Cola, I called for coke. I did not consider that filching or stealing [1502] from the Coca-Cola Company, not a bit. I did not consider that illegitimate at all. I did not see why it was not right. I think my morality in the transaction was all right, sir. If I lost my Coca-Cola contract I would do it again. I have got a perfect right, I own several counties around and have the name patented, and I would not hesitate to. No, I did not actually pass off my drink to the people as “Coca-Cola” and fool them with it. I did not try to do that at all. You say you thought I said that I did try to take advantage of the demand for Coca-Cola; we sold it for Koke, branded it plain “K-o-k-e,” every bottle branded “Koke.” I do not know whether our customers thought it was Coca-Cola, or not—they ordered “Koke.” XQ. 156. Did you think when you put this brand Koke on the bottle people seeing that brand on there, would think it was Coca-Cola? A. No, I did not think they would think it was Coca-Cola. XQ. 157. Did you think they could not tell the difference between your label—this label, Defendants’ Exhibit No. 24,—and the Coca-Cola label? A. The difference is very clear; there is a plain difference between the two, as far as the labels are concerned. XQ. 158. You think anybody could tell the difference between that label and the Coca-Cola label? A. Oh, yes, they are not similar, very much. XQ. 159. You think anybody could tell the differ-

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ence between the word Koke as written on Defendants' Exhibit No. 24, and the word Coca-Cola on the Coca-Cola label? A. I think it could be distinguished easily. XQ. 160. So, then, you put that label on there to distinguish your product from Coca-Cola? A. Well, I put it on as the name of our drink." You ask if I put it on there to distinguish [1503] it from Coca-Cola, or to make people think it was Coca-Cola; no, I did not give that part a thought—I did not care for it to be distinguished from Coca-Cola. I happened to pick up this name "Koke," just as I told you, because people called for coke. I think the majority of Coca-Cola drinkers in our section of the country when they want Coca-Cola would call for coke. I thought I would just call my drink "koke," and, when they wanted Coca-Cola and asked for it by that name—coke—I would just palm my stuff off on them as Coca-Cola—that is practically the size of it. Our drink was as similar to Coca-Cola as we could get it—we came as near reproducing Coca-Cola as we could. We were not selling Coca-Cola, we sold Koke, from 1902 up until 1909. I do not know whether you could put it in that form or not, that we substituted our product for Coca-Cola. We hoped to catch the Coca-Cola trade by the use of the name "koke." Oh, yes, I had heard the name "dope" up to that time. I do not know that I can give you the correct definition of the word "dope," but I take it as meaning something like opium or morphine, something of that kind—that

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would be my idea about it. I do not know that that is correct at all. Yes, sir; we had advertised our product some. Our trade did not cover a great territory. We were not out a great deal on advertising, it was mostly a local business. No, sir; I could not give you any idea about how much advertising we did, but we did advertise it some. We tacked up some posters. We spent very little in advertising the syrup. We advertised the other [1504] drinks that we were making very little; as I said, our business was local, and we were the only bottling works in that town. We did not put this label on any other drink except a cola drink. I could not tell you how long I had heard of this drink "Nervola," before we began buying it. "XQ. 183. What does the word coke ordinarily mean to you? A. Well, now, you mean 'k-o-k-e'? XQ. 184. Well, just the sound of coke? A. Well, it carries with it very much the same meaning that I gave you for dope, to me, to my mind—I do not suppose that word 'koke' has any meaning at all except of our manufacture, but if it has any meaning it is more like a 'coke-fiend,' or a 'dope-fiend,' or something like that." Oh, yes; I have heard of a "coke fiend." Oh, yes, sir, I have heard of a person taking morphine or cocaine—anything like that,—and referring to them as "coke-fiends"; oh, yes, sir. Yes, I have understood that these cola drinks had some kind of drug in it, of that kind, some kind of narcotic. Yes, sir, I have heard it said that they had cocaine

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in them. Yes, sir; the written assignment that we gave to Mr. Mayfield correctly states what we sold him. I think Mr. Mayfield visited our place of business long before this trade was made, or before we even owned the trademark "Koke." I do not remember Mr. Mayfield coming to Murfreesboro about two or three times in reference to this trademark "Koke." He might have talked to some of the others besides myself, but the trading was all done with me. No, sir; I do not know what he told other parties not in my presence. No, sir; I do not know whether he told the [1505] other members of this partnership or corporation, or whatever it was, that he had used the trademark "Koke" for years. I think the first visit he made with reference to the trademark "Koke" was about 1912. He first bought the whole of the United States, with the exception of Tennessee, and we exchanged papers on that. Then he came along later and bought Tennessee. He suggested himself that there was no use of registering the first papers at all—just let the papers include the whole thing, except the two or three counties which we reserved. which would wipe out the first transaction. "XQ. 204. Mr. Huggins, did you consider that your trademark "Koke" so nearly resembled the trademark Coca-Cola, as to be likely to cause confusion in trade, or deceive purchasers? A. I did not think there was but very little resemblance in the forming of the two words—in the formation of the two names. XQ. 205. Well, did you think

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there was any resemblance between them in sound, appearance, or suggestion? A. No, sir, not between Coca-Cola and Koke. XQ. 206. You consider them entirely different words? A. I consider them entirely different words. XQ. 207. Not only in the appearance, but in the sound of them? A. Yes, sir. XQ. 208. And in their significance? A. Yes, sir.” Yes, sir; at the time we made our application to register this mark Koke we had sold some of the goods to which the mark was applied in interstate commerce. We sold some in Alabama. I have got some papers down in the other room that will show who we sold it to, but I cannot give you the name right now. I do not know how long we had a trade on it outside of the state. We had some drummers selling this soda-water “Koke,” as a side-line. No, sir; [1506] we did not sell any in Germany, nor in France, nor in England, nor in any European countries. You asked if I did not swear to this statement, “that said trademark (referring to trademark Koke) is used by said corporation (referring to Murfreesboro Bottling Works) in commerce among the several states of the Union, and particularly between the states of Tennessee, Alabama and Georgia, and between the United States and foreign nations, or Indian tribes, and particularly with England, France and Germany”; I do not know—if that is there and my signature is to it, but we never even tried or thought of such a thing as selling it—we never knew what it would amount to later on, it

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might be valuable in foreign countries later on. No, sir, I do not value my oath lightly, sir. I do not know what is there, but what is there, I did not know that that carried any meaning; if it carried any meaning, I did not know what the meaning was. That paper looks like the real thing. It is Plaintiff's Rebuttal Exhibit No. 91, the record from the Patent Office. We had no trade outside of the United States on that brand of drink. I suppose that was intended for the future, if we wanted to hold rights to that trademark wherever it might be. You call my attention to this language in that oath, "that said trademark is used by said corporation in commerce with Germany"; if we ever had any commerce with Germany, I do not know it, sir. Yes, sir; I have been continuously bottling Coca-Cola since 1909. If we use a certain number of gallons of Coca-Cola a year, we get a rebate. I cannot recall the wording of the contract, but we get a rebate if we use so many gallons of syrup. No, we did not oppose the [1507] registration of the word "Koke" as a trademark by Mayfield, that I remember of. We did not have the slightest controversy with him over the name "Koke." The reason why he wanted to buy our trademark was, that he said, "Huggins, you have got the best trademark of all of them," and he says, "You have manufactured your word, that gives you a better title to it than a word that already existed," and he says, "I think I have bought the best one of the whole bunch."

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That was at the time of the first trade we made. In the course of the conversation our trademark Koke came up. I was on a trade with the Pine Bluff people, I believe who were wanting to buy the trademark from us, and I had made them a price on it. So, Mr. Mayfield told me he would like to buy it himself, and from that we exchanged propositions and traded, and that was the time he told us we had the best trademark of all of them, because of the fact we had used a manufactured word. We made the second contract, because Mr. Mayfield wanted them to include Tennessee, in his purchase. We wanted to reserve Tennessee, out of the first contract to protect ourselves from competition. We were bottling Coca-Cola then, we were not using anything that we called Koke then. We hoped not to brand anything with the name Koke any more, but we did not know about that for sure. You call attention to the following language in the letter dated November 3, 1914, addressed to J. C. Mayfield and filed as Plaintiff's Rebuttal Exhibit No. 93: "We do not believe a statement from us on this matter would do your case any good as we are bound to tell exactly why we registered this word Koke. We feel sure that a truthful answer to this question won't help your cause," and you [1508] ask me to explain what I meant by that; I had the idea in my head that if that was brought out, that Koke was used as a substitute for Coca-Cola, or to catch Coca-Cola trade, because of the fact that people called for coke, that wanted

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Coca-Cola, that it would be injurious. However, I consider that perfectly legitimate and honest—when they call for coke. We had plenty of customers that preferred what we were selling to Coca-Cola, and they asked for that as coke. We had just lots of them in our section, where we did business that preferred our stuff to Coca-Cola, and when we quit bottling and branding our goods Koke, they expressed themselves as being sorry and as preferring Koke. We did not get the name Dope and have that registered too, while we were at it because we just preferred the other. I do not know whether H. K. Wampole of Philadelphia is still making Nervola or not. I am under the impression that Mayfield had visited the plant before we began to make Koke because he was in that line of business. He manufactured syrups, etc., and I suppose he had called to sell us syrups. Yes, sir; we bottled some of his syrups. Celery-Cola was the brand we bottled. I do not remember any others. I would not say for sure that we bottled any of his stuff but Celery-Cola, however, we may have. I think the syrup we got from Mayfield came from Birmingham, that was prior to the time we adopted this trademark Koke. When Mayfield came to buy our trademark he did not explain that he was using the word Koke, and that the object he had in buying us out was to get rid of someone else who was using the same trademark as he was. Mr. Mayfield never made any such statement as that to me, or any such claim, [1509].

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or even suggested that he ever used the word Koke in any way. It strikes me as being very strange that if he ever used the word Koke prior to 1911 he would buy it and not mention it to me. No, sir; I am not aware of the fact that prior to the time he called on me he had actually registered the word Koke in every state of the Union. He never mentioned it to me. I think if that had been a fact he would have mentioned it—I fell certain he would. No, sir, I do not recall all he said to me on this occasion; I could not repeat his conversation word for word. I cannot tell you exactly how it is that I recall so distinctly that he did not mention this to me, but I know he did not—he was glad to get it,—he was glad to buy it. He never mentioned the fact that the cheapest way to get around it was to buy my rights instead of lawing it. What you suggest was never mentioned at all. No, I have not read over a part of his evidence in this case. Some of the gentlemen here told me what part of it was, and told me that he claimed just what you are talking about now, that he claimed prior use of the word. He said he wanted to buy it because he thought it was the best word that was patented, and he was in the drink business. He said he was going to organize a strong company and push it. You ask if his company was not already organized, as a matter of fact, at that time; I never heard of it if it was—as it now exists, I mean, as the Koke Company of America. I never heard of it, not until after he purchased this. I never heard of it at the time he came to make this

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first trade with me. You ask if, as a matter of fact, that first assignment is not made to the Koke Company of America; [1510] no, sir—probably it is, I do not remember whether it was made into a corporation or to J. C. Mayfield. It says the Koke Company of America, but I do not know whether that was an organized institution at that time or not; probably it may have been, I cannot say. My recollection of what occurred at that time is about as clear as it would ordinarily be about a thing that happened then, without any expectation of any trouble coming up or having to repeat it word for word. No, I did not expect at that time that anyone would ask me whether or not Mr. Mayfield had told me at this particular time that he had been using the name Koke prior to the time of this assignment—I never thought of such a thing. There was nothing in the world to impress that upon my mind, not a thing, no, sir. No, sir, I would not be as liable to forget that, if he made that statement, as I was that the assignment was made to the Koke Company of America; that would impress me. I did not believe he had a right to it, I had it copyrighted, and that would impress me, I think. I had the exclusive legal right to it. S. B. Christy and C. B. Huggins are still with me in this bottling company, and they are in Nashville, to-day. I only knew that W. L. Bitting had a trademark registered in the Patent Office, for the word Koke, from correspondence with Mr. Mayfield. He wrote me to that effect, and that was the first I

(Deposition of J. W. Huggins.)

ever heard of it. That was after I had sold to Mr. Mayfield. The Murfreesboro Bottling Works authorized a concern in Paducah, Kentucky to use the name Koke on a product it was bottling, but the license was strictly confined to Paducah so long as it did not interfere with us, and was to be discontinued at any time we saw fit. We did not supply them with [1511] labels. I do not know what they used, at all. There was a Pine Bluff concern that frequently wrote me about using the word, and was trying to buy it from me, along about the time Mr. Mayfield bought the trademark, I told him they had been using it and were trying to buy it. I have forgotten exactly what I had to say to them in regard to it, but I was on a trade with them to sell it to them when Mr. Mayfield bought the first time, and I had a proposition out to them at the very time Mr. Mayfield bought, and countermanded that proposition by telegram. No, Defendant's Exhibit No. 24, is not the only label we used, but that is the only label to paste on a bottle that we used after we had the thing copyrighted. You ask why we had our Koke crowns—those marked Plaintiff's Exhibits Nos. 101 and 102, printed in that color and on that silver background; why just showy, I suppose is why. We had other crowns like that, red on a silver background with a red circle around them, I think,—I won't be sure about that. They come in such a variety it is hard to answer. "XQ. 357. Do you think anybody would mistake that crown for a Coca-Cola crown?

(Deposition of J. W. Huggins.)

A. Not the reading of the crown. XQ. 348. Well, do you think the general appearance of the crown, anybody would mistake it? A. The only resemblance between that and the Coca-Cola crown is a little flourish on the letter. XQ. 359. And you think anybody could tell that right off? A. I think they could." (Plaintiff here tendered and offered in evidence the assignment dated November 28th, 1911, as Plaintiff's Rebuttal Exhibit No. 103.)
[1512]

**Deposition of S. B. Christy, for Plaintiff
(In Rebuttal).**

S. B. CHRISTY.

Direct Examination by Mr. ROGERS.

I am 46 years old, and live at Murfreesboro, Tenn. I am in the coal, ice, transfer and bottling business. I have been in that bottling business about thirteen years. Yes, I was connected with the Murfreesboro Bottling Works in 1902. That is the corporation that registered as a trademark the word Koke in the Patent Office. The application was filed April 10, 1905. The reason why we adopted the name Koke was because we were putting out a cola drink in competition with Coca-Cola,—we could not get the right to bottle Coca-Cola, so we decided on the word "Koke," as Coca-Cola was called coke a good deal. Coca-Cola was called coke by the public at Murfreesboro prior to the time we adopted the word Koke. Yes, I have called for Coca-Cola as coke, prior to June 1st, 1902. Yes, I was present at the interviews

(Deposition of S. B. Christy.)

with Mr. J. C. Mayfield, in 1911, and thereafter, concerning the negotiations for the purchase of the registration of the word Koke by Mayfield, or the Koke Company of America, from the Murfreesboro Bottling Works. J. W. Huggins was also present. C. B. Huggins was also connected with the Murfreesboro Bottling Works at that time, but he was not present at any of those interviews that I remember. No, sir, I did not hear the conversations—not all of it—I was just called there. No, I did not hear Mr. Mayfield, in speaking in regard to the word Koke, say what follows, or anything resembling it, “I explained to them my long usage, I knew I could win out in the courts, but I did not care to do that, they had done [1513] some advertising, popularizing my Koke, and finally I said, ‘let’s see if we cannot get together on a business proposition.’ ”

Cross-examination by Mr. LITTLETON.

I remember that a statement of that kind was not made. I would remember a question like that. You asked when was the first time I thought about that statement since the transaction occurred; to-day is the first time I ever heard it read. I heard it read one time before to-day. No, sir, nobody has ever questioned me about that before to-day. This is the first time that I have thought about it since 1911. To-day is the first time I was ever questioned about it or thought about it. No, sir, I do not remember all the conversations that took place, I cannot say that I do. We put the name Koke to any syrup we might buy and put up as a cola drink. We applied it in-

(Deposition of S. B. Christy.)

discriminately to any cola drink we would bottle. We bottled, as a matter of fact, anything we could buy, buying first at one place and then another. We tried to make it ourselves, but we made a failure of it. That was after we had been buying it from other people. We bought from Wampole and from Mayfield, and probably bought some from Hutchenson at Chicago—just any one that came along advertising an imitation of Coca-Cola, why we would take a chance on it, trying to get something as good as Coca-Cola. We applied this label to the drinks mentioned. We applied it to the drink we bought from Wampole. I do not remember about the Mayfield drink, because that was in the first year that we were putting up Celery-Cola. The name of the concern [1514] we bought from in Chicago, was, I think, W. H. Hutchinson & Son. These were extracts we bought, but Wampoles was not, it was in extract form. We had to add simple syrup to them. The label shown me, marked Defendants' Exhibit No. 24, is the label with which we labeled these drinks, when we put them out. That is the label we used while we were bottling these various products. We did not use it all the time; no, sir. We used that label after, probably some time in 1904. We had that label and used it, but we could not get it registered until 1905. We used it before we registered it. No, sir, we did not adopt this label after we had registered our trademark, that was before, I would not be able to tell you when we began to use the crown marked Plaintiff's Rebuttal Exhibit No. 101,—prob-

(Deposition of S. B. Christy.)

ably 1905. I suppose we adopted that kind of crown, just to make it as near like Coca-Cola as we could. At that time most everybody was trying to get an imitation of Coca-Cola, and a good many of them had crowns like this one, I mean red on a silver background, I suppose, crowns like that—the red letters on the silver background with a red ring around them were in general use at that time. There was no objection to our using them at that time. Yes, sir, I was one of the members of this concern when they adopted the name Koke. You ask if I wish the Court to understand that we deliberately adopted the name Koke in order to pirate upon the reputation and demand for Coca-Cola; I do not know what you call it, but that is what we did. I have told you what we did. You ask if that is my general character, if I am the kind of a person to do that kind of a thing; well, I suppose you could find out [1515] in my home town. We considered that a perfectly honest and legitimate business, sir, yes, sir. We did not put the name Coca-Cola on the bottle, because we had no right to. “XQ. 70. Did you think you had a right to put this name Koke on there? A. The Government thought so. XQ. 71. Didn't you know this name Koke, anybody looking at it would right off think it was Coca-Cola? A. No, sir. XQ. 72. Did not you know when they heard it spoken, they thought it was Coca-Cola? A. Well, I do not know about that. XQ. 73. Did not you know that the appearance of that word Koke, as it is written on that label, marked Defendants' Exhibit No. 24, looks so

(Deposition of S. B. Christy.)

much like Coca-Cola that you cannot tell the difference? A. No. XQ. 74. You mean to say it looks different from Coca-Cola? A. Yes. XQ. 75. You mean to say that anybody can tell the difference right off? A. Anybody that could read, they could. XQ. 76. But, as a matter of fact, however, it sounds just like the four syllabled name 'Co-ca-Co-la' don't it? A. No. XQ. 77. You think anybody could tell the difference in sound between the word Koke and the word Coca-Cola? A. Yes." Coke is a nickname for Coca-Cola. If I went into a fountain and asked for a coke, I would want a Coca-Cola. I could not tell you when I first heard the word coke. At one time we made up the drink we started to make with coca leaves, yes, sir. I can hardly answer what idea the words Coca-Cola convey to my mind, other than that I would want a Coca-Cola. If I heard a drink called lemon-orange, that name would convey to me the idea of a drink made from the essence of lemon and orange. "XQ. 88. Well, what idea does this word Coca-Cola convey to your mind? A. Made from coca leaves and cola nuts, I reckon. XQ. 89. Well, [1516] what idea does the word 'Koke' convey to your mind, 'K-o-k-e'? A. Nothing at all." It is just a nickname, is all I can say. Yes, sir, I have heard of a person who used cocaine, I have heard them referred to as a dope fiend, and I have also heard them called cocaine fiends. I never heard them called coke fiends. I do not know the name of that drink we put up, which we got from Chicago. It was some cola extract—there are so many of them,

(Deposition of S. B. Christy.)

I cannot remember. I cannot say that our customers thought when they bought our Koke that they were buying Coca-Cola. No, we did not intend for them to think that, because they knew we had no license to put up Coca-Cola. They knew that because Coca-Cola was selling there in competition to us, and if they wanted Coca-Cola, they would have to buy it from the Coca-Cola Company. No, sir, I do not know that when people went into the stores and stands where our customers were selling our drink and asked for a coke that they wanted Coca-Cola. No, I do not know that everybody who uses the word coke when he goes up to get a soft drink of this kind wants Coca-Cola. I cannot say whether or not after we adopted this word koke, and put out stuff under that name, that they always wanted Coca-Cola—when they asked for it under the name coke they were supposed to be wanting Koke, because we were bottling it there at our town and we were advertising it and selling it. We were selling that on its own merits then, and not pirating on the merits and demand for Coca-Cola. You ask why we went and adopted this nickname for Coca-Cola, if you wanted to sell it on its own merits; we had to have some name for it and that was the best name we could get. I do not know why it was the [1517] best name.

“XQ. 114. Don’t you know, Mr. Christy, that you adopted that name Koke for the sole and only purpose of enabling you to substitute your beverage for Coca-Cola and pass it off to the public and fool them and make them think it was Coca-Cola? No, we did

(Deposition of S. B. Christy.)

not try to fool them that it was Coca-Cola, because they knew it was not Coca-Cola. XQ. 115. How did they know it was not Coca-Cola? A. We advertised it as Koke." You ask if I think the name Koke sufficiently distinguished it from Coca-Cola to enable them to now it was not Coca-Cola; well, I do not know. Yes, sir, I do think that after we had been in business there for several years selling our product and advertising it as Koke, that our customers thereafter knew the difference between Coca-Cola and Koke, and asked for Koke and wanted it. From 1902 to 1909 we bottled Koke and sold it in competition to Coca-Cola. No, sir, we did not sell it as and for Coca-Cola. No, sir, we did not fool the people with and make them think it was Coca-Cola. I do not know, I guess when people asked for coke they did want Coca-Cola. We sold it to the merchants, we did not sell it to the people. Yes, we were putting it in the hands of our dealers. No, we did not tell our dealers that they could sell it when people asked for coke. We sold it in competition to Coca-Cola. You ask if I do not know when I picked up this nickname for Coca-Cola and put it on there, —K-O-K-E—if I did not know that I did that for the deliberate purpose of enabling my dealers to substitute that and palm it off to the people who asked for and wanted Coca-Cola; no, I cannot [1518] say that I did. No, I cannot say that we adopted the name Koke in order to distinguish our goods from Coca-Cola. It was a cola name, just the same as other names that had been registered, and we just

(Deposition of S. B. Christy.)

thought it was one of the best names along the line of dope and coke, and all other colas that they had been registering. I understood that the word dope had been tried to be registered at one time. In 1902 they called it by the name coke. Yes, sir, they called our drink coke in 1902. All of us at the factory called it coke, and the men that worked at the factory and the people in general—our customers. The fact of the business is, they call all of these drinks coke at times. These cola drinks are generally known as cokes and dopes.

Redirect Examination by Mr. ROGERS.

The commercial product which the word Coca-Cola conveys to my mind is a soft drink made by the Coca-Cola Company of Atlanta. The syrup which I said I bought from Mayfield at one time, was sold by me under the name of Celery-Cola, and was labeled Celery-Cola. You ask what other drink besides Coca-Cola had I ever heard nicknamed coke before June 1st, 1902; I never heard of one. When I, myself, prior to 1902, went to a soft-drink stand and asked for a coke, I had in mind and expected to get, "Coca-Cola." [1519]

(The following depositions were taken by plaintiff as its rebuttal testimony on June 9, 1915, at St. Louis, Missouri.)

**Deposition of Norville N. Leaver, for Plaintiff
(In Rebuttal).**

NORVILLE N. LEAVER.

Direct Examination by Mr. HIRSCH.

I reside at 2438 Washington Avenue, St. Louis. I have lived in this city fifteen years, and am thirty-seven years of age. I was employed by the J. C. Mayfield Manufacturing Company at St. Louis from June, 1903, until about the 15th of February, 1904, as city salesman here in St. Louis. When I was first employed, the place of business of the J. C. Mayfield Manufacturing Company was located on 18th and Olive Streets, formerly the Harmony Hall,—known as the Harmony Hall Building. I manufactured the syrup at the time I was with them. No, sir, when I worked for them the J. C. Mayfield Manufacturing Company did not ever manufacture, make, sell or advertise, or have anything of any kind or character with the name “KOKE” on it. You ask if I ever worked for the Celery-Cola Company of Missouri here; well, I worked for the party who succeeded the J. C. Mayfield Manufacturing Company, and who did business under the same name, only they put on “Celery-Cola.” They never had any product, or any stationery, or anything like that, with the word “KOKE” on it that I know of,—not while I was employed with them. I never sold it myself. I was around the place of business of the Mayfield Manufacturing Company from seven o’clock in the morning until seven at night, except

(Deposition of Norville N. Leaver.)

when I was out on the wagon. No, sir, I never did see "KOKE" around there. The only real product they were selling was "Celery-Cola." [1520] They were also selling a product called "Pepo-Ade," or some name similar, the name sounds like that. I saw the label filed as Plaintiff's Rebuttal Exhibit No. 104 used here by the J. C. Mayfield Manufacturing Company. It was made in solid red at one time, and yellow and red and black filling.

(Plaintiff here tendered and offered in evidence the label referred to as Plaintiff's Rebuttal Exhibit No. 104.)

Cross-examination by Mr. LITTLETON.

I am a manufacturer of soft drinks and have a saloon and cafe. I put out a drink known as "Orin-Cola." That is a drink something similar to "Coca-Cola," merely flavored with various ingredients, you understand. It looks like "Coca-Cola." It is colored the same as "Coca-Cola." I put it out in bottles only; it is not sold at soda-fountains. I have been making this drink since March 1st, 1904. I got the formula for making this drink from my partner. I formerly had a partner who made syrup for the J. C. Mayfield Manufacturing Company, and I went in business with him. My drink is not now made by the same formula, I have changed it considerably. I never had the drink while my partner was working for Mr. Mayfield. My partner made this formula when I went into business with him. He gave me the formula. He acquired the knowledge of that formula while he was working for the May-

(Deposition of Norville N. Leaver.)

field Manufacturing Company. He is the only one that did know it. I colored my drink the color of "Coca-Cola," for the simple reason that it is customary among the trade to demand black soda, or dark soda,—sarsaparilla of various descriptions. I don't know why I color [1521] this particular drink the color it is, except it is the custom from experience, when people ask for lemon-soda you have to have a white soda, and if they ask for sarsaparilla it is black; if they ask for "Dr. Pepper" it is black; and we color them for that simple reason, I suppose. I give it the flavor it has because people like a flavor of that kind. I never substitute my drink for "Coca-Cola." I make it the same color as "Coca-Cola." It does not taste like "Coca-Cola." It will not taste similar. You take the two together and you can tell the difference. There is no resemblance in taste. It is along the same general lines, however. I put my drink in white bottles, clear glass, seven-ounce bottles. You ask how the size, color and general design of my bottles compare with the "Coca-Cola" bottle; some "Coca-Cola" has blue glass bottles, green glass rather, and it is a little bit smaller on the top than mine. You ask if mine is the regular circular soda-water bottle. There are two or three different sizes. In my experience there is half a dozen styles on the market in the City of St. Louis. I will produce a bottle of my "Orin-Cola" and file it as Defendant's Exhibit No. 5 to my testimony. I was the outside salesman in the city when working for the J. C. Mayfield Manufacturing Company in

(Deposition of Norville N. Leaver.)

1903 and 1904. I visited throughout the city. The only occupation I followed was city salesman, that is all. I was a driver and delivered the goods, solicited trade, sold, collected money, and brought it in, etc. If I am not mistaken the J. C. Mayfield Manufacturing Company furnished syrup,—Mayfield made the syrup. I worked for that company somewhere around the 15th of February, 1913, and I stayed there until they discharged me. [1522] I think fifteen days after that we went into business ourselves. It was not 1913—it was 1914. During the period between 1904 and 1914 I had no connection with them whatever—Yes, sir, I was taken back. They came to the plant after the Liquid Carbonic Company took their machinery and bottled goods. I am not now connected with the Liquid Carbonic Company, and never was. I never did work for them. I said they came to bottle their goods after the Liquid Carbonic Company had taken their machinery away from them. I am not talking about the drink they manufactured. The party who formerly owned that company was a Mrs. Brooks. She had bought it off from the J. C. Mayfield Manufacturing Company,—that was 1905. The product was “Celery-Cola.” I was driving for her about—I don’t know how long, I don’t know what time she came in, but I stayed there until the weather got cold in February, and then she let me out. Of course, after that time I do not know anything about what other product she was making. All I know is that time Mrs. Brooks sold “Celery-Cola” and extract

(Deposition of Norville N. Leaver.)

syrup. The second business was located at 2224 Washington Avenue. The third place of business was sold out to a party named Knost. That was the latter part of 1905, I believe, or 1906, I cannot be positive. The only thing I know is that he had the output, and a friend of mine took the wagon after I left and he was driving for them and he told me. I remember all the different kinds of labels he used. He only used "Pepo-Ade" and "Celery-Cola." The only thing I can remember is this "Celery-Cola." I remember "Pepo-Ade," but he did not handle that so much, I handled it, but did not handle it so strong. The only way I could describe the labels is "Celery-Cola," [1523] only white, a capital "C," and kind of scroll work. They printed some of the labels white and some red. One time they had a red and a blue; another time they had a solid red, and another time they had red with blue and a yellow and black background. That is the only kind I remember of. I said that back in 1903 and 1904 I was city salesman, and was out in town going around to the trade. I worked as long as I wished to; I went to work when I got ready and quit when I got ready. I was in the factory twice a day after more goods, I would take the goods as fast as possible. They did not have bottles enough to supply the trade, and I would bring in bottles. I was acquainted with everything they put out. They mixed their syrup on the second floor. Yes, sir, I was just a salesman connected with the bottling department, I delivered syrup in gallon jars around the city. Of course, I did not

(Deposition of Norville N. Leaver.)

know anything about the business upstairs. I did not go up there. I did not know what they were doing up there. I do not know what products they were making upstairs. You say they may have been making a drink called "KOKE" upstairs for all I know; not that I know of. When I went into business Mr. Bohne has been associated with me for the last ten years and he told me everything—taught me how to make the formula,— and he never mentioned anything about the matter. I did not say that I did not learn the formula of him. I said the formula, when I started in business, was given to me, and he made this formula. I am referring to Mr. Bohne. He was the chemist for the Celery-Cola Company. All I know about the different things that were made upstairs is just hearsay. [1524] I cannot swear what was done upstairs.

Redirect Examination by Mr. HIRSCH.

Yes, sir; this work I said I was doing I also did for the J. C. Mayfield Manufacturing Company, I worked for them, also.

(Plaintiff here tendered and offered in evidence an exemplified copy of the petition and answer in the case of J. C. Mayfield Manufacturing Company against the Celery-Cola Company, in the Circuit Court of the city of St. Louis, Missouri, October Term, 1915, together with photographs of two labels which appear in the original petition as Plaintiff's Rebuttal Exhibit No. 105.) [1525]

**Deposition of John H. Bohne, for Plaintiff
(In Rebuttal).**

JOHN H. BOHNE.

Direct Examination by Mr. HIRSCH.

I reside at 4570 West Pine Street, St. Louis, Missouri. I have lived in St. Louis almost all my life. I worked for the J. C. Mayfield Manufacturing Company of St. Louis, in 1903, and up to March, 1904, as a chemist. As such, I manufactured all of the products that they put out, such as "Celery-Cola," fruits, and syrups and crushed goods, such as they had in that business at the time I went with them. If the J. C. Mayfield Manufacturing Company made, handled, advertised, or had anything of any kind or character around that place, with the name of "Koke" on it, I never did hear of it. No product with "Koke" on it, was sold while I was there. I never heard of any product that had the word "Koke" on it, not during my stay there. There was no literature, or any papers of any kind that had the word "Koke" on it.

Cross-examination by MARION C. EARLY, Esq.

I was employed there about a year. We originally were in the old Library Building at 18th and Olive Streets, where Butler Brothers' Building is now, and Mr. Mayfield sold out his interest to a man named Sykes, and, when Sykes got hold of it, I was made Manager of it. He moved the plant from there up to 23-hundred and something, Washington Avenue. I stayed right with the company after Sykes had con-

(Deposition of John H. Bohne.)

trol. Mr. Sykes kept a man by the name of McNish, of Nashville, as bookkeeper,—I don't know his initials, nor do I remember the initials of Sykes. I remained with the Mayfield people, I guess, about six months after Sykes let him out. I am pretty sure that the time I commenced my employment with Mayfield [1526] was April, 1903. At that time Mayfield's place of business was on Olive Street, near 18th. He occupied the whole building. I do not remember the number of it. It was a four-story building. They had a laboratory on the top floor. There were about twelve or fourteen people employed by Mayfield at that time. They did not keep anything on any of the floors, or two of them, they had a laboratory on the fourth floor, and on the second floor they had the syrup tank and kept syrup; on the first floor they had the bottling plant and the office, and in the front we had a public soda-fountain. On the other floors there was really nothing. I did not attend the soda-fountain. Mr. Brooks attended to that while he was there, and eventually they took hold of the plant. Mrs. Brooks and Mr. Sykes,—in fact, Mr. Mayfield took it back from Sykes and sold it to Mr. Brooks. Sykes operated it about four or five months. When Sykes got hold of it we made an arrangement with the Brooks people to buy the soda-fountain floor bodily,—that is, we sold "Celery-Cola,"—that is all we sold at that time. By the "Brooks people," I mean Horace Brooks and his mother. They came here from Nashville or Memphis. Under Sykes I was the manager of the plant.

(Deposition of John H. Bohne.)

As such, I checked up the drivers every day, took their receipts every evening, and kept a record of the bottled goods, and manufactured all the goods we needed in the line of syrups, and bottled it up. I sold nothing of that kind except "Celery-Cola." While I was with Mayfield, he sold three beverages, namely, "Celery-Cola," "Pepso-Ade" and "Lager-Ale," The last was in extract form. I got up the formula myself. I was with Mayfield altogether about six months, and then he sold out to Sykes. I was then with Sykes about four months, and then [1527] Mayfield got it back again, and, as soon as he got the plant back in his hands, we made arrangements with the Brooks,—Mayfield turned it over to the Brooks. They took over the plant and bought the syrup,—bought the extract which Mayfield shipped up here from Nashville. I held the position of chemist when with Mayfield, and manufactured all of the syrup. I did not do all of the work myself; when we were putting up the fruit two girls helped me. I am a chemist, having studied chemistry at St. Louis College of Pharmacy, which I attended three years. As a chemist, I did all of the compounding for Mayfield. He was not up here; I think he was in Nashville. I do not know just where the flavor came from that he used in his "Celery-Cola," that was the only part that I did not manufacture,—but I added that according to his instructions. What the formula called for, I did not analyze that. We had it sent up here in five and ten-gallon kegs, and we added that to the "Celery-Cola," the flavor. The appearance

(Deposition of John H. Bohne.)

of this "Celery-Cola" that he made was a dark brown, almost like sarsaparilla. The "Lager-Ale" looked like beer after it was bottled. It was red in appearance in the extract form, but it was diluted down. The appearance of the other beverage was also brown. The "Celery-Cola" and "Pepo-Ade" that we put up was put in eight-ounce soda-bottles. During the six months I was there, I do not know of any such beverage being sent out to any place as "Koke." Mr. Mayfield was not there very much; he was between here and Nashville most of the time. He came here maybe every week, and maybe only a few days, and then he would go back there. Mr. Britton was manager for a short time. I could not say that I saw everything that [1528] was sent out from that plant. I could not possibly see everything that was sent out. I do not think that Mr. Mayfield spent as much as half of his time here in St. Louis. I do not know where the labels were printed; I do not recall whether they were printed here or somewhere else. I did not have anything to do with this kind of label. The labels for the fruits and syrups I had printed here by the Cloyton Printing Company, myself. Mr. Mayfield turned the formulas over to me, with the exception of the formula for the flavor. When I left there he got them back again, I guess. I never took anything out of the place. He never give me the original formula, simply gave me copies of what he had. I did not myself make use of any of Mr. Mayfield's formulas outside of the line of my employment. While I was with him I made use of his

(Deposition of John H. Bohne.)

formulas, but after I left him I did not use his formulas. I did not use his formulas in any other connection, nor did I give them to anyone else. I am employed now by the Liquid Carbonic Company, whose business is soda-fountain supplies. They are large purchasers and jobbers of "Coca-Cola," and have been since long before I went with them. Yes, sir, I know Mr. Norvell N. Leaver. After I left Mayfield I went in partnership with him in 1904, in the manufacture and sale of a drink called "Orin-Cola." We originated that drink ourselves. We had the trademark registered in the State of Missouri, but nowhere else. We did not think it was necessary to register the trademark anywhere else, because the business was not worth that much. We were simply figuring on doing a local business and making a living. The color of "Orin-Cola" [1529] was a brown color like the usual cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them, so far as the color is concerned. Burnt sugar produces that color. By cola drinks I mean drinks that would be called by the name of some cola, "Coca-Cola" or "Aqua Cola," or anything of that kind of cola drinks. No, not anything that has that particular color,—it does not refer to color, it refers to the ingredients. My understanding of the thing is that any drink that would be called under the name of cola usually has the same color. The beverage which my partner, Mr. Leaver, and I manufactured had cola in it. I guess Mr. Leaver now has that formula. I sold out to him after about five

(Deposition of John H. Bohne.)

months. We created a demand for our drink under the name of "Orin-Cola." I place that beverage in the class which I designate as cola drinks. It was known as "dope," also. If I called a drink "Lemon-Orange," I would think its principal ingredients would be a combination of lemon and orange. If I heard it called "Orange-Cola," I think it would contain those things,—orange and cola. If I heard a drink called "Coca-Cola," I would think it contained coca and cola.

Redirect Examination by Mr. ROGERS.

I think the cola product called "Coca-Cola" would be "Coca-Cola."

"Q. Manufactured by whom?"

"A. Manufactured by the Coca-Cola Company, and advertised as such." [1530]

(The following depositions were taken by plaintiff as its rebuttal testimony at Chicago, Illinois, on June 10th, 1915:)

**Deposition of Herbert G. Warvell, for Plaintiff
(In Rebuttal).**

HERBERT G. WARVELL.

Direct Examination by Mr. ROGERS.

At present I am in the mail order business with Neese, Strassburger & Warvell, 164 West Washington Street, Chicago. I was a resident of Chicago during the month of April, 1913, at which time I was a detective in the employment of the Pinkerton National Detective Agency, making an investigation for

(Deposition of Herbert G. Warvell.)
the Coca-Cola Company. You ask if I recall, on April 24th, 1913, standing on Munroe Street and observing J. W. Mayfield in conversation with some one; yes, sir; I have some notes here. Those notes were made on the night of April 24th, 1913, by me, and I have them here with me now. (Referring to notes.) While standing on Munroe Street talking, Mayfield says: "Frequently at the Home Drug Company the two drinks get mixed, Koke gets in the 'Coca-Cola' urn, and *vice versa*, but, as no one can tell the difference, no harm is done." Mr. Boyd and myself were there at the time, but I don't remember whether Mr. Mansfield was there or not. The Mr. Boyd I refer to is E. M. Boyd, of Dallas, Texas. He was here in Chicago at that time endeavoring to sell the stock of this Koke Company.

Cross-examination by Mr. LITTLETON.

I had done some work for the Pinkerton Detective Company in the early part of 1913, but my permanent employment did not begin with them until I think about the latter part of March or the 1st of April. I had never done any detective work [1531] previous to 1913. Prior to that I was in the railroad business in the capacity of train dispatcher. I was employed as a Pinkerton detective in the interest of the Coca-Cola Company for about two months, from about the 1st of April, to the 1st of June, 1913. I was instructed to ascertain as much as possible about this Koke Company. I cannot say whether J. W. Mayfield was in Chicago during all the time I was working for the Coca-Cola Company, because I

(Deposition of Herbert G. Warvell.)

did not have Mr. Mayfield under surveillance all the time. My duties were to go around with Mr. Boyd and hobnob with him, follow him, and keep him under surveillance and find out all I could from him pertaining to the "Coca-Cola" case. I cannot say how many other detectives the Pinkerton Agency had employed on this case at that time. I cannot say how many they had working with me. At one time or another there were one or two men working. One was H. A. Scholz, another was Maurice Wolfe. I don't know what Wolfe's instructions were, but I think most of his duties consisted of keeping this young Mayfield under surveillance. I did not keep Mr. Boyd under surveillance during the entire time he was here in Chicago. He was stopping at the Palmer House, you know, and sometimes—say it would be nine-thirty or ten o'clock or ten-thirty, maybe later,—he would say, "I guess I will go to bed, and then I would go, but during the daytime, I don't hardly think there was a day but what we were together. There might have been one or two, I cannot say now, for sure. The excuse I gave for my presence with him was a pretense that I was a probable investor in his company; I told him probably I would want to [1532] buy stock in it. I was sent out primarily to watch him. Of course, that was my business; I was a detective, but then I didn't what you say, spy on him. If I got a letter for him I did not open it. I was instructed to keep J. W. Mayfield under surveillance after Boyd left here—I don't know what the month was; it might have been in

(Deposition of Herbert G. Warvell.)

June. The first time I was instructed to keep him under surveillance and the first time I did keep him under surveillance was June, 1913, I think. While shadowing Mr. Boyd, I wrote down everything he said in connection with this case,—everything he said or did pertaining to the Koke Company. Those were my instructions, and I carried them out as nearly as possible. I made a report every day of everything he said or did pertaining to this company, as near as possible. Of course, you understand, each conversation was not always put down word for word, only when some direct statement was made, something that I thought was very pertinent to the subject. I carried my note-book around with me, and, when a statement was made, I marked it down at the time. You ask how I knew what statements were important and what were unimportant for my purpose; well, anything pertaining to the subject, for instance, of “Koke” or “Coca-Cola.” To ferret out instances and cases of substitution where “Koke” had been substituted for “Coca-Cola,” may have been one of the objects of my being employed. I was primarily instructed to find out instances of substitution. It was a part of my duty to ferret out cases of substitution, if the substitution was intentional, I might say. I don’t remember any instructions at all where the substitution was unintentional, because, if the substitution was unintentional, it would, no [1533] doubt, be a mistake. I don’t remember that I got any instructions of any kind as to how I was to ascertain if the substitution was intentional or unintentional.

(Deposition of Herbert G. Warvell.)

I remember a conversation by J. W. Mayfield like that mentioned in my direct examination, but I cannot say the exact date of it. The notes I have recalled it to me. Irrespective of the notes, I cannot say for certain that I would have remembered it, unless all of the circumstances would have been brought up, don't you see. The circumstances I refer to are those embodied in the case. I don't remember what time of day this conversation occurred. I think it was in the afternoon, but I cannot say whether it was in the late afternoon or in the middle of the afternoon. I cannot say definitely and certainly that it was in the afternoon and not in the morning. I do not know whether we were standing on the corner of the street, or in the middle of the block, when this conversation occurred. I don't remember anything else that was said because I did not put it down in my report. After we left the place where this conversation occurred, I don't remember where we went, or in whose company I walked,—I don't believe I read my notes that far. [1534]

**Deposition of Maurice Wolff, for Plaintiff
(In Rebuttal).**

MAURICE WOLFF.

Direct Examination by Mr. ROGERS.

I am a detective in the employment of the Pinkerton National Detective Agency. I was employed during the month of April, and the following month, of the year 1915, by the Pinkerton National Detective Agency to conduct an investigation for the Coca-

(Deposition of Maurice Wolff.)

Cola Company. I was employed to go around and locate a man named Jerome Gibbons. The notes I hold in my hand are my reports of events which I made at the time they occurred, and they are in my own handwriting. I made notes of the things that happened that was of interest to my investigation, and then in the evenings when I went home I wrote out my report, and the papers that I have in my hand are the reports referred to. I received instructions from the assistant superintendent, W. J. Burns, to locate Jerome Gibbons for the purpose of making an investigation for the Coca-Cola Company, to find out what he was selling and what he was representing. I arrived at the Grand Saloon, 125 West Madison Street, at 12 o'clock Noon Friday, April 4th, 1913. While standing at the cigar counter, a young man entered answering the description given me of Gibbons. When he entered I overheard a man who was a regular patron in this saloon say, "There comes Coca-Cola." When Mr. Gibbons came in he spoke to two men about a bet he won on the horse races. I later discovered the name of the person who was alluded to as "Here comes Coca-Cola" his name is J. W. Mayfield. You ask if I recall, on April 8th, 1913, Mayfield's stating to me that he would have to leave me, and if I recall his obtaining a quart bottle from the cigar clerk and stating to me what it was; [1535] he then would leave me and he obtained a quart bottle from the cigar clerk of what he told me was "Coca-Cola." He said he would be able to sell a lot of it as there was no one

(Deposition of Maurice Wolff.)

who could tell the difference between the two syrups. Mayfield said there was no difference, that he sells it and bills it "Coca-Cola" and the trademark is the same. You ask if I was referring to the product sold by Mayfield under the name of "Koke"; yes, sir. (Objected to by defendant as leading and suggestive; overruled; exception.) Mr. Harper, soda dispenser at the drug-store at Clark & Van Buren Streets, told Mayfield he thought his boss would be ordering a barrel of "Coca-Cola" syrup as he was boosting it. While we were talking Carpenter and Lew Stern, soda dispenser for McLean's Central Drug Company, entered, Mayfield told him he sold the Central Drug Company five barrels of syrup on March 20th, and expected another order soon. Mayfield told Harper that he intends to see a Mr. Clark, buyer at J. R. Thompson's, he thinks he will be able to sell him some syrup. Harper and Stern said that he ought to be able to sell a lot of it as there was no one who could tell the difference between the two syrups. Mayfield said there was no difference, that he sells it and bills it as "Coca-Cola" the trademark is the same. Mayfield and I went to Diamond, the druggist at the Grand Pacific Hotel Building. Mayfield saw the manager and I overheard the manager say he could not use Mayfield's syrup. Mayfield then gave him a slip of paper, the same I attached to Tuesday's report. The Manager read it and said, "Then why don't you make the "Coca-Cola" people stop making it?" and Mayfield said something I could not hear. Mayfield then went to the soda clerk

(Deposition of Maurice Wolff.)

and told him the manager said he would see his lawyer and he would come and see him again. Mayfield also told the head soda clerk to try and persuade the manager to order [1536] the syrup and if he made a sale he would make it all right with him. Mayfield produced his order book and exhibited it to the clerk to show where he had gotten an order. As he opened the book the slightest it read "The Koke Co.," and he closed the book before I could see any more, as the clerk was busy and he had no time to talk. The slip I referred to a moment ago is the one marked Plaintiff's Rebuttal Exhibit No. 106. (Plaintiff here tendered and offered in evidence the slip referred to as Plaintiff's Exhibit No. 106.) The slip marked Plaintiff's Rebuttal Exhibit No. 107 is a price list which Mayfield gave me showing the prices that he got in the south for their stuff, and the Chicago prices. That is my handwriting on the bottom. On our way to the Grand Saloon Mayfield told me the retail price of his syrup is the only thing that is any different from the other syrup. He said the syrup comes in fifty gallon barrels and he sells it at \$1.00 per gallon, while the "Coca-Cola" price is \$1.50 per gallon. He also said he would undoubtedly sell considerable as he does the right thing with the head soda dispensers. During our talk he said the way his "Koke," can be sold easily is that most people at soda fountains ask for a drink of "Coca-Cola" as "coke" or "shot" or "dope" and it is not selling or misrepresenting "Coca-Cola" by serving "Koke." On April 12th 1913, shortly after 11.20 A. M., I had

(Deposition of Maurice Wolff.)

a conversation with Mayfield during which he told me that he could earn a thousand dollars a month if he would work every day. He told me he would give me twenty per cent commission if I would sell "Koke," and that no one could stop me from selling it as "Coca-Cola." He gave me the enclosed circular, "To Whom It May Concern"; and also showed me a typewritten copy of a statement signed by Mr. Murphy and Mayfield stating that in the year 1888 a Mr. Pemberton was in business in Atlanta, Georgia, manufacturing soda-water syrups, and also "Coca-Cola," and the [1537] trademark, that for a consideration of two thousand dollars from each he took Mr. Murphy, Mayfield and Bloodworth in partnership with him, giving them equal rights in his business, and also formulas and trade marks he had, and then, later, Mr. Pemberton sold to a Mr. Candler, or some similar name, the formula for "Coca-Cola" for a consideration of two thousand dollars without the consent of his partners. Mayfield then stated to me if I wanted the agency for the syrup, that I could sell it, bill it and ship it as "Coca-Cola" and nothing would happen to me, as he knows he has the "Coca-Cola" people very uneasy, as this is the first time anyone had endeavored to sell "Koke" north of St. Louis. He also said the headquarters was in St. Louis, but the "Koke" was made in New Orleans. At 11.45 A. M., April 14th, 1913, Mayfield asked me to accompany him as he intended to call on some dealers. He carried his bottle of "Koke" and went to the Tea Room at 19 North

(Deposition of Maurice Wolff.)

Washington Avenue, where he introduced his syrup as "Koke," and also spelled it, says it is the same as "Coca-Cola." The dealer asked if he shipped it as "Coca-Cola" and Mayfield said he did not, as it came from another state, but the Koke Company intended to start an office here and make the syrup and would then label it "Coca-Cola." The man tried a glass of "Koke" and said he could not taste any difference, but said he had a gallon keg of "Coca-Cola" on hands, and, if he would come around about June 1st, he might give him an order for some "Koke." We then went to the confectionary store in the Postal Telegraph Building, and Mayfield introduced his syrup as "Koke," and the proprietor told him he had sold "Coca-Cola" since 1893 and would not change; and if his syrup [1538] was the same as "Coca-Cola," then he ought to sell it as such, but that it would be impossible for him to serve "Koke" to his patrons if they asked for "Coca-Cola." Mayfield explained to him that eight out of ten customers in ordering "Coca-Cola" asked for "coke." The man said "That may be true, but they mean, and I know they want 'Coca-Cola.'" Mayfield gave the man a circular similar to Plaintiff's Rebuttal Exhibits 106 and 107. On June 7th, 1913, I met J. W. Mayfield accidentally, and during our conversation he told me he sold seventeen barrels of "Koke" to the following concerns: The Fair Department Store, Seagle, Cooper & Company; the Whiteside & River-view Parks; also said that A-1 Soda dispenser formerly with McLean Drug Company, had a new posi-

(Deposition of Maurice Wolff.)

tion and he expected to get an order from him. Mr. Harper, formerly with Krouscut Drug Company, had a new position with the Berry Candy Company, he told me he had to see a party and had to leave, saying he missed me and wished I was around. You ask if Mayfield ever had a conversation with me concerning his domestic affairs, and you ask whether or not he made the following statement: "That he is rooming with an Irish girl and had been rooming with her for the past four years, that they were not married; that she traveled with him, and that when he leaves town she always accompanies him, but that she always buys her own ticket, but that he gives her the money, that the reason for this arrangement is that he does not want to get into trouble for taking her from one state to another and that she has been in twenty-seven states with him"; Yes, sir.

(Defendants object to the question and answer [1539] because the question is decidedly leading and suggestive, and is just putting the words in the witness' mouth. Objection overruled; exception.)

Cross-examination by Mr. LITTLETON.

Yes, sir; I have some independent recollection of the things I have testified about aside from these notes. Yes, sir, it is a fact that I have read each of my answers to the questions that were asked me, from these notes. When any question was asked me I just read from my notes as my answer to the question. I am an investigator for the Pinkerton National Detective Agency and have been a detective for pretty near five years. I was employed in in-

(Deposition of Maurice Wolff.)

investigating facts with reference to this lawsuit for probably a month, during the month of April, 1913. My instructions were to find out anything that had to do with the Coca-Cola Company, that is, with Mayfield and the Coca-Cola Company. No, I was not sent out to shadow this man Mayfield, nor was I sent out to keep him under surveillance. I became acquainted with him just hanging around the saloon where he hung out, the Grand Saloon. I was instructed to go and stay with him and be in his presence as much as possible. No, sir, I don't consider that keeping him under surveillance. I read from my notes here instead of testifying straight out off hand in answer to the questions on direct examination because I wanted to refresh my memory. I don't know that I could have stated it without referring to my notes. I have now read my notes through completely. I couldn't tell you just now which parts of my testimony I could have remembered without referring to *the* [1540] my notes. I am still in the employ of the Pinkerton National Detective agency. Yes, sir, I read my notes over before I came into this room to testify.

Redirect Examination by Mr. ROGERS.

The occurrences concerning which I testified took place during the year 1913.

Recross-examination by Mr. LITTLETON.

I don't know whether Plaintiff's Rebuttal Exhibit No. 106 is the one which I attached to my report or not. There is nothing on there to identify it as the particular one I had, but I can identify this Rebut-

(Deposition of Maurice Wolff.)

tal Exhibit No. 107 as the one I had because I wrote on it and it has my handwriting on it. [1541]

(The following deposition was taken by plaintiff as its rebuttal testimony at Charleston, West Virginia, on June 11th, 1915:)

Deposition of Claud W. Hickel, for Plaintiff (in Rebuttal).

CLAUD W. HICKEL.

Direct Examination by Mr. HIRSCH.

My full name is Claud Wallace Hickel; I am twenty years of age, and reside at 423 State Street, Charleston, West Virginia. Formerly I worked for the Anti-Monopoly Drug Company, at Acala, Florida, for about two and one-half years. I left there this last June. At first I worked at the fountain for three or four months, and then the druggist left and I took his place, but I attended the fountain at different times; for instance, at noon and in the morning before anybody came. Yes, sir; I was acquainted with the syrup that they used at the fountain there. During the time I was employed by the Anti-Monopoly Drug Company they did not have a drop of "Coca-Cola" there that I know of. Yes, sir; they had calls for "Coca-Cola" at the Anti-Monopoly Drug Store, and syrups or drinks were dispensed in the place of "Coca-Cola." I think I was in Ocala, Florida, at the time the "Coca-Cola" people brought suit against the Anti-Monopoly Drug Company, but I am not positive. I was there about the time the suit was discussed. I have talked about

(Deposition of Claud W. Hickel.)

the suit with Mr. H. C. Groves, the Manager of the Anti-Monopoly Drug Company. I cannot recall the conversations I had with him, I cannot give the exact conversations. The substance of it was that he wanted it to be known that he was not substituting for "Coca-Cola." He wanted me to make it known before the Court in this case that he was not substituting anything for "Coca-Cola," but that he was [1542] selling "KOKE" as "KOKE." If a person came in and asked for "COCA-COLA," he would say, "Dope?" and pump it. No, I did not myself carry out that procedure at the Anti-Monopoly Drug Company,—that is, when a person would call for "Coca-Cola" I would not say "Dope?" and pump it—sometimes I did, but other times I didn't, the same as he did. Mr. Groves himself served at the fountain at times. I noticed that on these occasions he did not say "Dope?" and then pump it.

Cross-examination by Mr. LITTLETON.

I am now in the drug business, employed by Krieg & Price, No. 1 of this city. We have no soda-fountain. I have been here ever since I left Ocala, Florida, with the exception of four or five weeks, during which I took a vacation. I went to work for the Anti-Monopoly Drug Store two and a half years ago; I quit there last June; I am now twenty years old. The Anti-Monopoly Drug Company kept its various syrups in the rear of the drug store. Besides myself, the others working there were: Elmer Small, John Allen Ritchie, Gracey Thompkins, Ray Ferguson, and a fellow named Alfred Adcock,—that is all

(Deposition of Claud W. Hickel.)

I remember right now. Elmer Small, John Allen Ritchie and Gracey Thompkins and Ray Ferguson were at the soda fountain. Adcock was the druggist when I came there. These people were employed at different intervals. I cannot remember them in rotation, but they came and went while I was there. None of these people was employed as soda-fountain dispenser while I was employed as dispenser. We usually had there only one dispenser. Everybody put the syrups in the fountain to make the drinks, but it was the porter's duty; however, he very seldom did it,—just different ones of us did it. [1543] Each one of these different gentlemen must have, at some time or other, put the syrup in the fountain; I have done it myself. I put in the fountain the fruit syrups, root beer and I don't know what I put in there for "Coca-Cola," I don't know what it was. I think it was "Koke,"—sometimes it was. Dr. Groves didn't always tell me what it was; he had several different kinds of things. I had to depend on what it was by what somebody else told me, because the barrels were not always labeled. When they were not labeled, of course, I did not know what was in them. Yes, sir; the drinks which I did not know what they were, looked like "Coca-Cola" and tasted very similar to it. I could tell the difference in taste, but everybody couldn't have told it. I knew the difference between it and "Coca-Cola," and when we changed the brand, I could tell. I could tell one of these substitutes from the other,—at times I could tell that he didn't have "Coca-Cola."

(Deposition of Claud W. Hickel.)

He sold something very similar to "Coca-Cola," very few people could tell the difference unless they were habitual users. I, myself, couldn't tell at times; for instance, one barrel would come in and the taste was very similar, and I couldn't tell the difference, but another would come in and would not be just like it. Now, the barrel that tasted so similar to "Coca-Cola," I couldn't tell the difference between it and "Coca-Cola," I couldn't tell, of my own knowledge, whether it was "Coca-Cola" or not, except that the barrel was not labeled. I didn't go down to the depot to get the barrels. Really, I don't know whether it come in red barrels or not. The fact of the business is I don't remember all of the labels on the different barrels. The only way I could tell whether the [1544] stuff was "Coca-Cola" or not was by looking at the barrels; if they were labeled I could tell what was in them; if they didn't have any labels on them, I couldn't tell what it was. You say, so far as I know, it might have been "Coca-Cola" in the barrels which I say were not labeled; no, it was not "Coca-Cola," because Dr. Groves said it was not; he told me it wasn't "Coca-Cola." Yes, sir; he told me what every barrel was when it came in, but I don't remember what he said it was. As well as I remember he said he bought from four or five different houses,—he bought at times from the Wise-Ola Company. The only way I had of telling what was in the barrels, except what somebody told me, was by the label on the barrel. Otherwise the barrels looked pretty much alike, except some were

(Deposition of Claud W. Hickel.)

larger and some were smaller. I could tell what the stuff was when I opened the barrel and saw that it wasn't "Coca-Cola," but I knew it was used for "Coca-Cola." I knew it was used for "Coca-Cola" only by what he said, what Dr. Groves told me. I couldn't remember any special occasion when he told me that. He took it as a joke that was selling this stuff for "Coca-Cola." No, I did not take it as a joke, nor did I take it seriously,—I didn't pay any attention to it. I knew that he could be prosecuted for it, if it were found out. No, I didn't know that I could be prosecuted for substituting it, also. I did, in fact, substitute it. I did practice a fraud on my customers there, and did so for two and a half years. I cannot tell you what the particular substitute was in every particular instance that I did substitute. I saw several of Dr. Grove's bills. He had several different products at several times. I couldn't say positively that it wasn't "Coca-Cola," but I had a pretty good [1545] idea that it was not; I got that idea nowhere except from his word. Aside from that, I didn't know, I couldn't tell whether it was "Coca-Cola" or not. I had no way of analyzing it. I cannot tell by tasting it always, but at times I could, very frequently I could. No, "Coca-Cola" does not always taste the same to my palate. He never had a "Coca-Cola" barrel in the house as long as I was there. The way I distinguished the "Coca-Cola" barrels from those other barrels I have mentioned, is because they always label them. I hardly think it possible that a "Coca-Cola" barrel could

(Deposition of Claud W. Hickel.)

come in not labeled, because I never saw but one but what was labeled. Yes, it certainly is possible for it to come in not labeled; it is possible, but not probable. I imagine I have seen quite a few "Coca-Cola" barrels in my life. Before I went with Dr. Groves I worked at the PostOffice Drug-Store, but I don't know exactly how long, and then I worked for Dr. Anderson, as relief clerk, as well as I remember, about three weeks. They didn't have a soda-fountain at Anderson's, but they did at the Post-Office Drug-Store, and I was at the soda-fountain there and drew the syrup. At that place we dispensed "Coca-Cola," root beer and soda water of fruit syrups. The only difference, in my mind, between the barrels I have seen these other drinks I have mentioned come in and the "Coca-Cola" barrel, is that the "Coca-Cola" barrels that came to the Post-Office Drug-Store were all labeled,—they had big labels on the head of the barrel. Why, yes; that was the only way I could tell the difference between the "Coca-Cola" barrel and the barrels containing these other drinks,—they were very similar. The Anti-Monopoly Drug-Store was a corporation. [1546] Besides Dr. Groves, Prof. W. Wiley was a stockholder. He is Professor at Fusidin College at Ocala, Florida. Yes, sir; I knew at all times just what particular syrup I had in the fountain, whether it was Wise-Ola or Rye-Ola, or whatever it happened to be,—not each particular kind, but sometimes I knew that the barrels was Wise-Ola, and other times I knew that the barrels was "Koke" I believe it is. I am not certain about

(Deposition of Claud W. Hickel.)

this "Koke"; I only had Dr. Groves' word for it. No, sir, I didn't observe the stencil on the head of the barrel. I remember sometimes there was a kind of monogram of coca leaves, or something like that, some kind of tropical plant on the head of the barrel, on the label. That was on one of the barrels, I don't know which it was. Yes, sir; I know what coca leaf is. I have heard of it a great deal, we use it quite often in the drug-store. If I heard a drink called "Lemon-Orange" I would imagine it would be composed of a combination of lemon and orange; if I heard a drink called "Lemon-Cola" I imagine it would be something similar to "Coca-Cola" with lemon, or something like that. When I heard this drink called "Coca-Cola," I suppose it has to have the coca leaves in it. I am not licensed to practice pharmacy, nor have I an assistant's diploma. Yes, sir, I have been working as a drug clerk, mixing prescriptions in this State, as well as in the State of Florida, without a license. No, sir; I have not studied pharmacy at any school. No, sir, we did not frequently have two of these cola drinks I have mentioned in the fountain at the same time. I kept them in two spigots. I cannot say that I didn't have "Wise-Ola" and "Rye-Ola" in the fountain at the same time. I might [1547] have had two of the same kind of drinks in the fountain at the same time. So far as I know I might have had "Wise-Ola" in one of the spigots of the fountain and in the other spigot this thing that had this tropical plant on the barrel. I don't remember the name of the drink

(Deposition of Claud W. Hickel.)

that had this tropical plant on the label. The syrup that was very similar to "Coca-Cola" was the last one he had, I think, which he called "Koke." You ask if that was the one that had this tropical picture on the head of the barrel; I don't know which one it was. It may have been the one he called "Koke," and it may have been another one. When a customer came in and asked for "Coca-Cola" I served from the handiest spigot, I don't know what you would call those drinks that were in those two spigots—substitutes for "Coca-Cola." We called them "dope," "coke"—whatever the customer asked for.

"Q. 155. What names did you use to classify those drinks?

"A. We generally called them 'dope.'

"Always during those two and a half years that I was there I kept those always in the same two spigots, so far as I remember. Yes, sir, the spigots got out of order quite often during the time I was there, and one or the other of these "dope" spigots frequently got out of order, but it didn't take but about three seconds to fix it if there was any trouble. We sometimes changed them to scrub them, but we would put them back in the same container as soon as we were through. The spigots were never changed, so far as I know, during the time I was there. They were the first two on the right of the carbonating arm as I stood behind the counter [1548] facing the people. I had no instructions as to which spigot I was to draw the syrup from. I was first approached with reference to testifying in

(Deposition of Claud W. Hickel.)

this case by F. C. Peace, a "Coca-Cola" detective. I talked to him while I was down in Ocala, Florida. He approached me and questioned me with reference to my connection with the company down there. That was while I was still employed at the Anti-Monopoly Drug Store. I don't remember what they questioned me about. All I know is that I ignored them and didn't pay no attention to them. I have never dispensed soda water at any other fountain where they had some of these other coca-cola drinks, —not to my knowledge. If they had anything else but "Coca-Cola" they were pretty shrewd and kept it from me. I got the idea that all these drinks were substitutes from Dr. Groves, who told me when I first went to work for him that all his drinks were substitutes. By "substitutes," I mean something to be served in competition with "Coca-Cola," to be served in the place of it. You ask how many drinks of this sort I have run across; I think four or five would cover it. They were all about the same color and all had a similar taste. A majority of the customers at the Anti-Monopoly Drug Store could tell the difference between the drinks that we were selling and "Coca-Cola." I have had them refuse the drinks we sold. I suppose about one out of every twenty-five or thirty would do so. The reason why I know that a majority of them could tell the difference between the drinks we sold and "Coca-Cola is because they would tell me so. We had some customers that came there every day or two to our place and they usually came to our fountain.

(Deposition of Claud W. Hickel.)

The majority of our customers,—what I mean, regular customers—didn't ask for "Coca-Cola." They asked sometimes for "dope" and [1549] sometimes "coke," but they knew they were not getting "Coca-Cola."

Redirect Examination by Mr. HIRSCH.

When people came to a soda-fountain and asked for "dope" or "coke," I understand they wanted "Coca-Cola."

Recross-examination by Mr. LITTLETON.

When a man comes into the sode-fountain and asks for "dope" he is under the impression that he is getting "Coca-Cola." I know he is under that impression, because that is the name that has become a nickname for "Coca-Cola." You ask how I got that in my head. Why, it has always been there. When they ask for "Coca-Cola," they say "dope." I always knew before this that "dope" was a nickname for "Coca-Cola." I cannot answer how I found out that "dope" was a nickname for "Coca-Cola." [1550]

(The following depositions were taken by Plaintiff as its Rebuttal Testimony in New York City, on June 14th, 1915:)

Deposition of Ernest Higgin, for Plaintiff (in Rebuttal).

ERNEST HIGGIN.

Direct Examination by Mr. HIRSCH.

I am fifty years of age and reside at 51 Van Houten Avenue, Passaic, New Jersey. I formerly worked

(Deposition of Ernest Higgin.)

at Coshocton, Ohio, from the 6th day of September, 1898, to June 24th, 1911. I started with the Standard Advertising Company, which later consolidated with the Meek & Beach Company. Then Mr. Beach severed his connection with the concern and it was called the Meek Company, and then that was recognized and then called the American Art Works. I had charge of the pressroom, or printing department, and all printing work went practically through my hands. All printing or signs and everything of that kind went through my hands. All advertising matter went through my hands. They had a branch there which was simply called the gum process, but that didn't amount to anything until later years, about the last three years of my connection with the firm. This gum process department engraved a composition which was rubber vulcanized, they made a few sign that way. You ask whether, during my connection with the three concerns I have named, there was any advertising of any kind or character that went through any of those concerns with the name "Koke" on it; no, sir, I don't remember that, it is blank to me. I don't remember any name like that. I remember some advertising with the name "Celery-Cola" on it.

Cross-examination by Mr. LITTLETON.

I have been in the printing business about thirty-five [1551] years. I was practically superintendent of the printing department, for each of these concerns above mentioned. Our company printed advertise-

(Deposition of Ernest Higgin.)

ments for numbers of companies all over the land. It would be difficult to say how many concerns we printed advertisements for during that time—I think it must have been as high as 200 orders we handled, but the reason I remember the soft drinks is because there were very few of those advertised on metal, such as “Coca-Cola.” I remember them, because we done their work so many times. We handled their work for a great number of years. These “Celery-Cola” people used to advertise extensively, but other soft drinks, very seldom. They were considered in our line as a cheaper grade of work, because metal advertising was expensive. I do not remember the name of the company for which we did the “Celery-Cola” printing, nor do I know where it was located, nor when the printing was done. I believe we done 5,000 transparencies for them, I don’t remember anything about the time during which we printed these advertisements for them. We also printed advertising for a ginger-ale concern and for root beers. One of the brands of the different root beers which we printed advertisements for was “Hires.” There was another small firm in Cleveland we done a small job for, but I cannot quite recall their name. There was another firm in Cleveland that imitated “Coca-Cola” very closely; we only done a job for them once. That was along about 1910 or 1911. I don’t remember any other soft drinks for which we printed advertising about the time we printed this “Celery Cola” advertising other than those I have already mentioned. There was very few. [1552] We did this “Celery-

(Deposition of Ernest Higgin.)

Cola'' printing about 1909 or 1910, as near as I can recall. Yes, sir; I mean to say that in 1910 there were very few soft drinks being advertised,—that is, on metal. You ask if that was the only kind of printing we did; we done metal, and we done transparencies, that is a sign you paste on,—a good many of them are gummed on windows. I was in charge of that gum process from 1908 to 1911; I was not in charge of it prior to that time, because it was practically a very small department. I am connected now with the Passaic Metal Ware Company, still doing the same kind of business. You say that the fact of the matter is that I have handled so many different kinds of advertising over so long a period that I couldn't possibly remember all the kinds of advertising printing I did; there might have been some slip in my memory, but advertising for several years was confined to practically beers, liquors, wines and a few soft drinks. The only ones I can remember now are "Celery-Cola" and "Coca-Cola." There was one more in Cleveland that imitated "Coca-Cola." it started with a K, "Kola-Kole," I think it was, but those are the only soft drinks that I can remember. There may have been others that have slipped my memory at this time. [1553]

**Deposition of Henry Hartman, for Plaintiff
(In Rebuttal).**

HENRY HARTMAN.

Direct Examination by Mr. HIRSCH.

I am fifty-one years of age and reside at Passaic,

(Deposition of Henry Hartman.)

New Jersey. I am with the same company as Mr. Higgin. I formerly lived in Coshocton, Ohio, from December, 1898, until July, 1911. I was with the Standard Advertising Company, the Meek & Beach Co., the Meek Company, and the American Art Works during that period. I was in the lithographic art department of those concerns during that entire period. I do not remember any advertising of any kind or character with the name "Koke" on it during the time I was with the concerns I have mentioned.

Cross-examination by Mr. LITTLETON.

I don't remember whether or not we got out lithographed pictures, or posters, and sold them to various parties indiscriminately, who later, after buying them, had their names and products printed on them, like calendars, posters, and hangers. It may have been done in some other department. I was in the lithographic art department which was the same department that Mr. Higgin was in. I was superintendent of that department; I had charge of that department during the whole time I was there as foreman. There is no difference between superintendent and foreman; it is practically the same thing. No, they did not have two superintendents in that department, they just had one. I have been in the business now thirty-four years altogether. I could not give you any idea as to how much advertising matter we have turned out during that time, nor could I remember all the kinds of advertising I have turned out. [1554] There was a great amount turned out. I remember fairly closely the names of the com-

(Deposition of Henry Hartman.)

panies for which we have turned out advertising, but I couldn't remember all of them; that would be too much. I remember the names of the products fairly well. I remember the names of all of the products advertised during the past twenty-four years fairly well, and I am still in that same business. The different products we have advertised have been all classes of commodities. During the past thirty-four years we have advertised such soft drinks as "Coca-Cola," "Mova-Cola," "Celery-Cola," "Red Cherry Phosphate," and things of that kind. Those are all the soft drinks we have ever advertised in the past thirty-four years,—at least that is all I can remember by name. There may have been others whose names have slipped my memory. There were some waters we advertised, "Mount Laurel Springs" and Lithia waters, I couldn't remember all of those. I don't pretend to remember the names of all the different commodities advertised in the past thirty-four years. Our business was so large and so varied that I couldn't remember all of soft drinks advertised since 1900. I could remember nearly all of them, however. No, I couldn't right now remember how many drinks we have advertised since 1900. I could not recall at this time all the names of all the soft drinks we have advertised; that is an awful amount, soft drinks. I couldn't say how many soft drinks we have advertised from 1900 down to date, but it is a great many. Roughly guessing, I should judge about twenty-five.

(Deposition of Henry Hartman.)

Redirect Examination by Mr. HIRSCH.

In these concerns I worked for Mr. Higgin had charge [1555] of all the presses and was practically the superintendent over all.

Recross-examination by Mr. LITTLETON.

No, I did not work in the gum process department. I don't know what went on in that department, Mr. Higgin had charge of that.

STIPULATION.

It is agreed and stipulated by and between counsel in the above causes that the testimony of the witness Harrison Ferguson, of Spartanburg, South Carolina, taken at Atlanta, Georgia, and the exhibit thereto, shall be, and is hereby, suppressed. It is further agreed and stipulated that the testimony of Leaver, of Spartanburg, South Carolina, taken at Atlanta, Georgia, so far as it relates and pertains to testimony and the exhibit of the witness Ferguson, shall be, and is hereby, suppressed; that part being suppressed being the redirect and recross-examinations. It is further agreed and stipulated by and between counsel in the above-styled causes, that the testimony of Mrs. Rufus H. Paige, nee Miss Alice Wheeler, to be taken at Spartanburg, South Carolina, shall not be taken, but her testimony is hereby agreed to be between counsel, and the following shall be read as if Mrs. Rufus H. Paige had appeared and testified in accordance with the rules of the Court, and her testimony shall be read as if [1556] she had so appeared, the agreed statement of facts being as follows:

“The said Mrs. Rufus H. Paige, nee Miss Alice Wheeler, worked for the J. C. Mayfield Manufacturing Company, or the Celery-Cola Company, as book-keeper, and stenographer, during the year 1906, and that if the said Mrs. Paige had been placed on the stand she would have testified substantially as did Miss Annie N. L. Bonham, who testified on behalf of the plaintiff at Birmingham, Alabama.” [1557]

(The following depositions were taken by plaintiff as its rebuttal testimony at Atlanta, Georgia, on June 21st, to 24th, inclusive, 1915:)

**Deposition of H. B. Pierce, for Plaintiff
(In Rebuttal).**

H. B. PIERCE.

Direct Examination by Mr. HIRSCH.

Mr. HIRSCH.—Mr. Littleton has asked me to produce certain contracts, and I herewith produce to Mr. Littleton contract prepared by the office of Candler, Thomson and Hirsch, which we will call Plaintiff's Rebuttal Exhibit No. 110; and I produce a Jobber's Contract of the Coca-Cola Company for 1914, which we will call Exhibit No. 111; and I produce Dispenser's Contract for 1914, which we will call Exhibit No. 112; I produce Jobber's Contract for 1915, which we will call Exhibit No. 113; and I produce Dispenser's Contract for 1915, which we will call Exhibit No. 114. The documents referred to are tendered and offered in evidence as Plaintiff's Rebuttal Exhibits Nos. 110 to 114, inclusive.

(Defendants object to any testimony on the part of

(Deposition of H. B. Pierce.)

H. B. Pierce, because he was present during the taking of all the testimony in chief of the plaintiff, and during the taking of practically all the testimony of the defendants, and was present during the taking of a good part of the plaintiff's rebuttal testimony, and was not under the rule. Objection overruled; exception.)

I reside in Atlanta, Georgia, where I have lived for the last five years. Prior to my coming to Atlanta, I lived in Philadelphia, Pennsylvania. At Philadelphia I was employed by the Pinkerton National Detective Agency, as Assistant Superintendent, head of the Criminal Department. [1558] When I moved to Atlanta, I became superintendent of the Southeastern Division, Atlanta office of the Pinkerton National Detective Agency. I was with that detective agency here in Atlanta for three years. I am thirty-nine years of age. At present I am in charge of investigation work for the Coca-Cola Company. Pursuant to my investigation work for the Coca-Cola Company, I visited the Yellow Pine Pharmacy at Hattiesburg, Mississippi. From complaint made regarding the product being sold by the Yellow Pine Pharmacy as and for Coca-Cola, I ordered an investigation, made of that place of business. After that investigation, an analysis was made from samples secured from that concern, which they sold as and for "Coca-Cola," which analyses and report showed that the samples secured were not "Coca-Cola."

(Defendants object to the statement as to what the

(Deposition of H. B. Pierce.)

analysis showed, because hearsay; overruled; exception.)

After receiving these reports I went to Hattiesburg, Mississippi, and called on Mr. Jones, the proprietor and manager of the Yellow Pine Pharmacy. It was J. B. Jones, I think. I called on Mr. Jones for the purpose of seeing if we couldn't make some agreement or arrangement with him whereby he would discontinue the practice of fraudulent substitution in regard to "Coca-Cola" with a view of preventing any litigation. I saw Mr. Jones, who acknowledged that for more than a year he had been substituting a product known as "Ko-Nut" as and for "Coca-Cola," and that, during the two years' time that he had been doing that, that he had sold upwards of eighteen barrels of "Ko-Nut" against one or two barrels of "Coca-Cola," and that for the entire year 1913 he had not bought any "Coca-Cola."

[1558 $\frac{1}{2}$] I endeavored to get Mr. Jones to enter into an agreement with the Coca-Cola Company to stop that practice, and he requested to be allowed to consult his counsel, which was agreeable, and he consulted Stephens & Cook, who, upon being made acquainted with the facts by myself, and shown all the reports, together with the analysis, instructed Mr. Jones to enter into an agreement with the Coca-Cola Company, which he did. That agreement has not been put in evidence. It was in the form of letters from counsel. The letter dated February 18th, 1914, from James E. Jones to H. B. Pierce, care Candler, Thomson and Hirsch, Atlanta, Georgia, is a letter re-

(Deposition of H. B. Pierce.)

ceived by me on or about February 20th, 1914, from Mr. James E. Jones as result of my interview with him.

(The letter referred to was offered in evidence as Plaintiff's Rebuttal Exhibit No. 115.)

I next visited the Owl Drug Store at Hattiesburg, Mississippi, E. J. Williams, proprietor. After an investigation had been made of the product being sold by the Owl Drug Company, at Hattiesburg, Mississippi, I called on that concern on February 13th, 1914, and saw Mr. E. J. Williams, the younger member of the firm, and took up with him the reports of the investigations made,—together with the reports of the analysis made of the product being sold by their concern, as and for “Coca-Cola,” with a view of reaching an adjustment and having the practice of fraudulent substitution remedied. When I first approached him, Mr. Williams became very disagreeable and was very bitter against the Coca-Cola Company and all of its representatives, particularly one of its traveling salesmen, who, he claimed, had been disagreeable [1559] to him, with the result that he had decided that any unfriendliness towards the Coca-Cola Company would be justified on his part. Mr. Williams admitted that he had handled considerable of a product known as “Ko-Nut,” and, also, that he handled some “Coca-Cola,” stating that when he had distinct calls for “Coca-Cola” it was the practice to serve “Coca-Cola,” but when any nicknames were used for “Coca-Cola,” such as “coke” and “dope,” or any names of that character, that they

(Deposition of H. B. Pierce.)

always made it a practice to serve some imitation product, particularly the "Ko-Nut." Mr. Williams admitted freely that it was his understanding that the terms "dope" and "coke" were "Coca-Cola," but stated that it didn't make any difference to him or his partner in the business as to what they understood, that he would give the public what they pleased. In addition to that, he stated that he was a member of the Mississippi Pharmaceutical Society, and that it was his purpose, together with the aid of his brother, to endeavor to get this society to boycott "Coca-Cola" in the State of Mississippi; that he had conferred with the Yellow Pine Pharmacy, of Hattiesburg, and the Love Drug Company, and the Corner Drug Company, which was then run by Thornton, and had practically secured agreements from them that they would discontinue the handling of "Coca-Cola" and handle nothing but imitation products.

(Objection by defendants because not proper rebuttal, no foundation having been laid for such testimony in the cross-examination of defendants' witnesses. Overruled. Exception.)

I stayed with Mr. Williams something like two hours, [1560] between twelve-thirty and possibly two-thirty; before leaving him he said he would take up with his brother the question of agreeing with the Coca-Cola Company to stop the handling of these imitation products, and that I could see him later in the day. During that interview Mr. Williams admitted a number of times that there was a probab-

(Deposition of H. B. Pierce.)

ity that some of this "Ko-Nut" and other imitation products that they had handled had been sold for "Coca-Cola"—that in the rush of business they didn't charge themselves with being particular as to what the customer asked for, or as to what the customer got, whether they asked for "Coca-Cola," "coke" or "dope," and that if customers were served an imitation product when "Coca-Cola" was asked for, it was a mistake that no business man could be charged with responsibility for. I called on Mr. Williams again about eight-thirty that night, at which time he was about seven-eighths drunk and in a very disagreeable mood. I met him in the center of the store—he had a customer with him at the time—spoke pleasantly to him, and asked him what his brother had decided regarding entering into the agreement with the Coca-Cola Company, and he stated that he had taken it up with his brother, and that they had also taken it up with an attorney in Hattiesburg, by the name of A. M. Foote, and that on account of this consultation they had decided they would not discontinue the practice and that the Coca-Cola Company could sue and go to hell as far as the Owl Drug Company was concerned, that they would continue their practice. Now, during the intervals that I was there, I went into the back of the Owl Drug Company and saw there a fifty-gallon barrel of the product "Ko-Nut" and called Mr. Williams' attention to it, and he admitted that he had been purchasing [1561] "Ko-Nut" for three years and proposed to continue to do so. He stated

(Deposition of H. B. Pierce.)

they had used about four hundred gallons of "Ko-Nut" syrup a year and possibly about two hundred gallons of "Coca-Cola." Mr. Williams admitted several times that it was his understanding, and, also, other members of the firm, that "coke" and "dope" were nicknames for "Coca-Cola," and had been for years. I then went to the place of Burton Jones, of the St. Elmo Drug Store, at Chattanooga, Tennessee. As a result of investigations made at that place, and of samples of syrup secured which that concern was dispensing as and for "Coca-Cola," I called on Mr. Burton Jones on January 9th, 1914, at about 5 P. M. I saw Mr. Jones, and informed him of the result of our investigations, and, also, that, before taking the matter any further, we desired to see him and see if we couldn't reach some agreement whereby he would stop the practice of substitution and avoid any further trouble through litigation or otherwise. Mr. Jones at first denied that he was guilty of substitution, but when shown the report of the investigators and the result of the analysis of the syrup taken from his fountain, he stated that it was possible that he had for a short time substituted a product by the name of "Tru-Cola" for "Coca-Cola," that they had recently moved into the place they were then occupying and that at the time of their removal, they had run out of "Coca-Cola" and had some "Tru-Cola" left of a fifteen-gallon purchase that they had made some time ago, and that it was possible that some of the "Tru-Cola" was the syrup which our investigators had purchased at the time. I then went into the moral

(Deposition of H. B. Pierce.)

side of business of that kind, and Mr. Jones admitted freely [1562] that it wasn't the proper thing to do, and stated that, beginning with the year 1913, he had entered into a new partnership—I didn't see the partner at that time—and that he would take the question up with him and he believed the best thing to do would be to enter into the agreement, as there was a possibility that there had been some substitution going on. He also stated that at their previous place of business Mr. Fred W. Wesenberg was Mr. Jones' partner, and, during all of this time that they had never handled any "Coca-Cola," but always handled an imitation product, but since his new partnership they had discontinued it and handled "Coca-Cola," with the exception of the fifteen-gallon purchase of "Tru-Cola" which I mentioned before. Mr. Burton Jones agreed to sign the agreement, and, before doing so, he said he thought he would include their Alton Park Store, which I knew nothing about, requesting that I wait until about 6:30 until his partner returned to the store, so that he could consult him about it, and, on his return, this agreement was signed. The agreement referred to is filed as Plaintiff's Rebuttal Exhibit No. 116.

(Plaintiff here tendered and offered in evidence the document referred to as Plaintiff's Rebuttal Exhibit No. 116.)

I then visited the place of business of C. P. Embrey, of Chattanooga, Tennessee. After an investigation had been made in connection with the business of Chas. P. Embrey, who we had information

(Deposition of H. B. Pierce.)

was somewhat of a notorious substitutor, I went to his place of business on January 9th, 1914, about noon, and saw Mr. Embrey and acquainted him with the results of our investigations, Mr. Embrey became very nervous [1563] and stated that for a couple of years, on account of very poor business and low financial condition, he had been compelled to buy a cheap product,—the product itself being “Ko-Nut,”—and that during the entire years of 1912 and 1913 he had purchased something like eight barrels of “Ko-Nut,” and that during the year 1912, he had purchased only one barrel of “Coca-Cola,” about forty-six gallons, and that during the year 1913, he had only purchased about 10 gallons of “Coca-Cola.” Mr. M. Duff, who was then manager of Fritts & Weihl, Wholesale Druggists, in Chattanooga, was with me and Embrey at the time, and I had luncheon engagement with him, and through Mr. Duff, I verified Mr. Embrey’s purchases of “Coca-Cola” for the years 1912 and 1913.

(Defendants object to Mr. Duff’s verification as being, of course, hearsay; overruled; exception.)

Embrey freely stated a number of times during our conversation that he thoroughly understood the terms “dope” and “coke” to be nicknames for “Coca-Cola,” and that he knew that, when customers came to his fountain and asked for “dope” and “coke” they meant “Coca-Cola,” an expected to be served “Coca-Cola,” and that the reason he served a substitute was because it was cheaper and because of his alleged financial condition.

(Deposition of H. B. Pierce.)

(Objected to by defendants because no foundation was laid for such rebuttal testimony in the cross-examination of C. P. Embrey. Overruled. Exception.)

Before leaving Mr. Embrey I had him sign an agreement with the Coca-Cola Company that he would discontinue his practice of fraudulent substitution. The document [1564] marked Exhibit No. 117 is the agreement that Mr. Embrey signed.

(Plaintiff here tendered and offered in evidence the document referred to as Plaintiff's Rebuttal Exhibit No. 117.)

I then visited the place of business of Boyd & Jackson, at Kosciusko, Mississippi. After an investigation had been made in connection with the business of Boyd & Jackson, as far as the product "Coca-Cola" was concerned, and after it had been determined by analysis that the samples secured from them were not "Coca-Cola," I called at the place of business of Boyd & Jackson on February 11th, 1914, between 8 and 10 P. M. and had an interview with Mr. Boyd, one of the proprietors, and took up with him the question of substitution, with a view of having him agree with the Coca-Cola Company that he would discontinue the practice and avoid any further trouble. Mr. Boyd at that time desired an opportunity to consult his partner and other people. I again saw him next morning, and renewed our conference, at which time he refused to sign any agreement of any kind, and stated that, while he had been handling imitation products one

(Deposition of H. B. Pierce.)

of which was "Ko-Nut," and that he had also purchased one barrel of "Koke" syrup from the Southern Koke Company of New Orleans, that he only sold these products in response to calls for "coke" and "dope." But he freely admitted that there was a possibility, and a probability, that considerable of these imitation products had been sold as and for "Coca-Cola" on request for "Coca-Cola," but didn't think he was in any way responsible for that. I did not use any obscene or vile language of any nature, kind, or character, when I [1565] interviewed Mr. Boyd. I was very emphatic with him, but used no unseemly language with him at all,—it wasn't necessary.

I then visited the place of business of Owsley & Beerman, of Kosciusko, Mississippi. After an investigation as to their business, and reports secured on the samples of syrup being sold as and for "Coco-Cola" by this concern, as not being "Coca-Cola," I called on Owsley and Beerman on February 11th, 1914, and took up with Mr. Owsley and Mr. Beerman the report of investigations that had been made. Both gentlemen admitted that they had been guilty of using an imitation product,—“Ko-Nut”—in large quantities; that they were first induced to buy this product in 1911, and between February, 1911, and the date of my visit, February 11th, 1914, they had purchased something like twenty-three barrels of an average of fifty gallons each of this "Ko-Nut" and had purchased about 250 gallons of "Coca-Cola" between February, 1911, and Feb-

(Deposition of H. B. Pierce.)

ruary, 1914. Both Mr. Owsley and Mr. Beerman freely admitted that their understanding of the terms "dope" and "coke" was that it meant "Coca-Cola," and that, when customers came to their fountain and made use of these terms, they meant and wanted "Coca-Cola." Mr. Owsley further stated, after our conference, that he was very glad I had come to see him; that they ~~had~~ been contemplating for a long while discontinuing the handling of imitation products; that he was thoroughly convinced that it was wrong, and had taken the matter up with Mr. Beerman a number of times with a view of stopping it, but that, in consequence of my visit, they would discontinue the [1566] handling of any imitation product which they would sell as and for "Coca-Cola"; and, in that connection, I secured a signed agreement from both Mr. Owsley and Mr. Beerman, containing those facts, together with way-bills of the shipment referred to in that agreement. The paper marked Exhibit 118 is the agreement referred to.

(Plaintiff here tendered and offered in evidence the agreement referred to as Plaintiff's Rebuttal Exhibit No. 118.)

No, I did not use any obscene, or vile, or unbecoming language in the place of business of Owsley and Beerman, or any language that I couldn't use at all in the presence of ladies. I spent a very pleasant evening with Mr. Owsley. I never used any language that I couldn't use in the presence of ladies in any of these visits that I made. It wasn't neces-

(Deposition of H. B. Pierce.)

sary. The facts themselves were always sufficient. No, I never visited the place of business of the Hyde Drug Company, at Ellisville, Mississippi, but I had some communication with them. Investigation was made in connection with their business during August, 1914, and a sample of the product being sold as and for "Coca-Cola" by this concern was secured, and analyzed, and reported not to be "Coca-Cola."

(Recitation as to what the reports showed is objected to by defendants because hearsay. Overruled. Exception.)

On August 25th, 1914, I wrote the M. W. Hyde Drug Company, of Ellisville, Mississippi, this letter dated August 25th, 1914, which was introduced as defendants' Exhibit No. 229. In reply to that letter I received a letter from the Hyde Drug Company signed by J. R. Kelly. Secretary and [1567] Treasurer 31st, 1914, which letter is marked Plaintiff's Exhibit No. 119. In reply to that letter I wrote to J. R. Kelly, secretary and treasurer of the Hyde Drug Company, of Ellisville, Miss., under date of September 3d, 1914, this letter marked Plaintiff's Exhibit 120.

(Plaintiff here tendered and offered in evidence the letters referred to as Plaintiff's Rebuttal Exhibits Nos. 119 and 120 respectively.)

On January 14th, 1914, accompanied by A. B. Freeman I went to Mr. Dalton's office in the Hennen Building, in New Orleans, somewhere around noon, and I stated to Mr. Dalton that I understood he had

(Deposition of H. B. Pierce.)

been formerly connected with the Southern Koke Company in an official capacity and that he had severed his connection with that concern, and desired to know the reason why he severed his connection. Mr. Dalton at first was very reticent, and stated that he didn't care to be mixed up at all with any of the controversies between the Southern Koke Company and anybody else; that he had just entered into a new business, the insurance business, and that he had made some friends, and that he didn't care for those friends to know that he had ever been connected with the Southern Koke Company, or ever had anything to do with it. Mr. Dalton ascertained the fact, however, that both Mr. Freeman and myself were Masons, and stated that he had become connected with the Southern Koke Company in June, or July, of 1913, for the purpose of selling stock for the concern, and that he had purchased some of the company's stock and also sold considerable of it to friends of his; that shortly after [1568] Mr. Scott's death he was made general manager of the concern. I questioned Mr. Dalton as to the methods by which the Southern Koke Company was doing business, and particularly as to the instructions of salesmen of that company in selling their product, and Mr. Dalton stated that it was the instructions of himself for the salesmen to go to the drug-stores, confectioneries, and others, who had soda-fountains, and inquire of them as to the amount of this "Coca-Cola" business and when that was ascertained, to say to the manager,

(Deposition of H. B. Pierce.)

or proprietor, "Why not give us part of your 'Coca-Cola' business, because 'Koke' is just the same as 'Coca-Cola,' the only difference being its name; that is made from the same formula as 'Coca-Cola,' that it will cost you considerably less than 'Coca-Cola' and you can make considerably more profit"; that if the dealer was to say "Well, when people use the term 'Coke' they mean and want 'Coca-Cola' " the salesman was to say "What difference does it make to you what they mean? they ask for 'Coke,' and you should give them 'Koke' "; "They will not know what you give them and there is absolutely no difference between 'Koke' and 'Coca-Cola.' " Mr. Dalton further said that J. C. Mayfield claimed to own one-fourth interest in the formula of "Coca-Cola," that he understood that to be so. We also talked to Mr. Dalton about where the Southern Koke Company obtained their trademark. He stated it was his understanding that they bought some small concern out who had the name "Koke" and that Mr. Mayfield had paid this concern about four hundred dollars for their recipe, as he called it. I asked Mr. Dalton whether the Southern Koke Company manufactured "Koke" under the recipe of the concern [1569] that Mayfield had bought out, and he first stated he didn't know, but, on his attention being called to the statement and claim of Mr. Mayfield that "Koke" was made from the formula of "Coca-Cola," he admitted that the recipe which was bought from the small concern couldn't be manufactured by the Koke Company. He fur-

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ther stated that the Southern Koke Company secured all their product in extract form from Van Deusen, of St. Louis, that it was not made by them, nor was it made by the Koke Company of America; that the branch plants were also furnished with this extract from Van Deusen, and they only added simple syrup to make it up in syrup form. Dalton said that he severed his connection with the Southern Koke Company some time during August of 1914, and, questioned as to why he severed his connection, he stated that he was not in accord with the character of the business, or the policy of running the same, and, also, that J. C. Mayfield had not treated him just right; but he wouldn't state what this treatment was; that he had, in severing his connection with the Southern Koke Company, compelled J. C. Mayfield not only to purchase the stock he had bought, but also to purchase the stock that he, Dalton had sold to his friends, and, pressed a little closer as to why he got out and why he didn't stay with the company, he again repeated that the business was not satisfactory to him, he didn't care to be identified with it. Asked about the advertising of the Koke Company, if he had ever seen any outside of New Orleans, Mr. Dalton stated he never had, that he didn't believe that in all of his travels around Mississippi and Louisiana he had ever seen any advertisements [1570] of the Koke Company. During our conversation, Mr. Freeman made a remark to Mr. Dalton something like "A business being conceived in iniquity and born in sin couldn't

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survive” and that statement was made in connection with a statement made by Mr. Dalton, who said that he believed that the Coca-Cola Company had made a serious mistake when they didn’t buy up that “Koke” trademark and get it off the market. Mr. Freeman replied that he didn’t think so, that “any business conceived in iniquity and born in sin couldn’t survive,” and about the time we were leaving Mr. Dalton, he repeated that phrase and stated, in connection with that, that was one of the reasons why he had severed his connection with the Koke Company, that “any business conceived in iniquity and borne in sin couldn’t survive.” That about concluded my interview, with this exception; all through that interview Mr. Dalton practically tried that he not be called as a witness, and practically prayed to get Mr. Freeman and I, as Masons, to absolve him from testifying. I wouldn’t make any statement at all other than to say to him we would like very much to have his testimony, and he promised us in going away, that if we wouldn’t put him up as a witness he wouldn’t testify for the Southern Koke Company, or the Koke Company of America, or any of its allied interests, and stated that if they did call him as a witness, he would furnish us with sufficient matter to protect us. Now, Mr. Dalton also stated as one of his reasons why he didn’t care to be mixed up with this was that he was up for election in the Shrine, and he didn’t care for the people—particularly the Shriners in New Orleans—to know he was ever connected [1571] with J. C. May-

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field or the Southern Koke Company. In addition to that, during our conversation we went into the question with Mr. Dalton as to the definition of the term "coke" particularly, and also "dope" as to his understanding of these names and as to what he had learned, and Mr. Dalton admitted freely that it was his understanding that the terms "coke" and "dope" were nicknames universally used and long recognized for "Coca-Cola," and that was, he believed, one of the reasons Mr. Mayfield had adopted the name of "Koke" taking technical advantage of that condition in the trade. I made the notes from which I have given the above testimony within one hour after I left Mr. Dalton—just time to go to the Hotel Monteleon, get the paper, make myself comfortable, and sit down and write it. I did not send a list of questions to Mr. Dalton, but Mr. Freeman did about ten days after that. The questions were based on that interview we had. We never received any reply from him.

Cross-examination by Mr. LITTLETON.

The first employment I ever had was with the James H. Nichols Construction Company, of Philadelphia, as office boy. The next employment I had after that was with the Pinkerton National Detective Agency, with which concern I have been connected for thirteen years. I was never in the employ of the United States Government, was never in the Treasury Department and never worked for that department. I severed by connection with the Pinkerton National Detective Agency and entered the

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employ of the Coca-Cola Company on August 28th, 1913. Prior to that time I had done work for [1572] Coca-Cola Company for about four years, the nature of which was making various investigations, practically in regard to fraudulent substitutions. I was superintendent of the Pinkerton National Detective Agency during part of the time I did this work for the Coca-Cola people, and I was assistant superintendent in Philadelphia part of the time. Altogether I have been doing work of this character for the Coca-Cola Company for five or six years. The position I now occupy with the Coca-Cola Company is that I have charge of all their investigating work in connection with fraudulent substitution, infringements and any other such investigations that the company requires. I have charge of the investigators, I was never admitted to the bar and never practiced law. I have, however, acted as counsel in this case and in other cases brought by the Coca-Cola Company against other companies, associated with other counsel. I examined the witnesses, associated with other counsel. The Coca-Cola Company, or Candler, Thomson and Hirsch, had six investigators or detectives employed investigating the facts with reference to this present suit—that is, six directly, namely, D. E. Bolton, F. C. Peace, S. Friend, C. C. Ross and Frank Pratt and T. M. Murphy. You ask how many investigators or detectives have been employed in the interest of the Coca-Cola Company in the present case; I cannot tell you that, I don't know—probably twenty-five or

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thirty. I don't know how many are employed from the offices of Reed & Rogers of Chicago, there is only one from their office that I know of. I should say the Coca-Cola Company has employed in this case twelve Pinkerton detectives, and one ex-chief of [1573] police that I know of. They have employed two different detective agencies, namely, the Pinkerton National Detective Agency and George H. Bodeker of Birmingham, Alabama. There was no detective agency employed in St. Louis that I know of other than the Pinkerton. If any other agency was employed it was entirely without my knowledge either then or now. Aside from the special detectives or representatives or investigators that were employed on this case, the entire sales force of the Coca-Cola Company, numbering ninety men, have been at work assisting the attorneys for the Coca-Cola Company in the preparation of this case. In addition to that, a few "Coca-Cola" bottlers in various localities have been assisting, together with the Dallas branch of the Coca-Cola Company, the manager thereof and the people connected with that office. However, none of the jobbers have given any assistance to my department. So far as I know there have been altogether directly and indirectly at work on this case in behalf of the Coca-Cola Company approximately 125 people. You say you notice in this list of detectives employed by the Coca-Cola Company, that I have left out the name of Boswell. He is no longer in the employ of the company—he wasn't for a year or more. But he was on this

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case, yes, sir. I do not know where he is now. I don't believe he is with the Pinkerton people any more, but I don't know. He severed his connection with the company on account of excessive expense bills, and because incompetent generally. You ask what schooling, if any, I put these investigators and detectives through so as to render them competent for the work when I employ them; well, the majority of these [1574] investigators that I have there in this work with me for the Coca-Cola Company, came from the Pinkerton Agency and consequently had two or three years investigating, teaching and instruction; and other teaching of course, was not necessary—that is in this particular work. Now, if you ask what instructions they are given, that is something else. All of these parties I have mentioned, including Boswell, had been doing work of this character for the Coca-Cola Company prior to the time they entered the employment of the Coca-Cola Company directly, with the exception of Murphy and Ross. I was their superintendent in the Pinkerton National Detective Agency, and I put them through a general schooling in order to fit them for their work. You ask what was the nature of that schooling; well, the nature of that schooling, to begin with, was to put them with thoroughly experienced investigators, let them work with them for probably a month or two, so that they will understand how to make out the reports and secure information and various other work that may come to their attention. Of course, every particular piece

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of work a man is given, he is thoroughly instructed as to the general facts and the details desired, and told, of course, how would be the best general way to get at them. He is likewise under the instruction and charge of his superintendent or his assistant superintendent, who follows his daily reports carefully by reading them and if there is any errors or mistakes, either of omission or commission, he is corrected immediately either in person or by mail. You ask what instructions were given these parties when they went to work on this [1575] case; our instructions to our men, first, if we have a particular place to investigate, is to go to that place of business, but before going there to attach to themselves a disinterested witness, some man of good character who is a resident of that particular town; the first thing our men do in going into a place where they are investigating, is to go to the fountain and one of the men asks for "Coca-Cola," the second man, regardless of whether it is the witness or the operative—it don't make any difference at all—you say you didn't ask what they did, but what their instructions were; that is the instructions. One man goes to the fountain—one of the men asks for "Cola-Cola" and the other for "Dope." Both the operative and the witness are to observe the container in the fountain from which the syrup is drawn to make both of these drinks and also to note how that container in the fountain is labeled. They make no statement of any kind at that time. They come back in about another hour and duplicate the test, and one asks for "Coca-

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Cola" and the other asks for "Coke" and they again observe from what container in the fountain the syrup was drawn to make the drinks, noting, also, how it was labeled. They do that possibly four times, or maybe five times, that first day, alternating between "Coca-Cola," "Dope" and "Coke" one man always asks for "Coca-Cola" and the other asks for either "dope" or "coke." Now, for the second day's work they start off with the same spigot test again. That is what we call the spigot test. If there is only one particular fountain it is done at that place only, if they have three or four places, they alternate and do the three or four places all in the same day. On the second day they are instructed again to go to the fountain and one [1576] ask for "Coca-Cola" and the other ask for "dope." They observe from what container in the fountain the syrups to make those drinks are drawn, and also how it is labeled, and make a note of that and make a note also of the time they go in, how long they stay there, and the time they come out, and in addition to that they also note the first and second days, or any number of days they stay there, how many other people come there and ask for "Coca-Cola," "dope" and "coke" and they observe also from what container in the fountain the syrup is drawn to make drinks in response to those calls. They not only make the actual test themselves, but make the test of observation and keep account of that. Now, after the second test is made, another spigot test is made in which they again go in and one asks for "Coca-Cola" and the other

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man asks for "Dope." Sometimes it is the witness and sometimes the investigator, who presents the dispenser with a six or eight ounce bottle with the request "Please be good enough to fill that with 'Coca-Cola' syrup" distinctly saying "Coca-Cola" so there will be no question as to what was asked for, and generally the dispenser fills the bottle with the syrup and both the witness and operative observe from what container in the fountain the syrup was drawn to fill that bottle. Through a pretense or otherwise they ascertain the dispenser's name, and immediately after doing that, if it is the operative who purchases the sample, he hands that sample to the witness, and they both then go to their room in the hotel where they seal the bottle with sealing-wax, and the operative has an identification seal which has his initials on it, and then some identifying mark such [1577] as the top of a telegraph pole, or a circle with an "R" in it, or a triangle with an "S" in it, each sample has its identifying mark as to the particular operative,—and he puts his stamp on that seal in the presence of the witness. He then immediately writes out a label, of which we have a printed form, giving all the facts of that purchase, the date, the name of the store, its location, the city and street location, the hour that they entered the store, what they asked for, how much was paid for it and also the container in the fountain from which the syrup was drawn to fill the order for the sample, together with the dispenser's name. And then that label is signed by the purchasing operative, or the

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witness, as purchaser, with the witness' name and address, city and state, and after that is placed on the bottle it is sealed in one or two places with the sealing-wax, with the identification seal on it, and then forwarded to me by express. Now, I have been speaking of this thing in the past tense, as though that was what was actually done; I mean these are the instructions that were given to the men, in this particular case. In some particular cases I instruct the witness,—rather the operative, after he has secured the second sample—which may be the third day that he is in that town, or possibly the fourth, it depends on the condition which he thinks is best suited to the purchase of the sample, to first ask to see the proprietor, and if he is not available, to ask to see the manager, and then introduce himself as a representative of the Coca-Cola Company and in a pleasant [1578] way to ascertain from that proprietor or manager what is his understanding of the term “Coke” and “Dope” as applied to a soda-fountain beverage. In special cases we sometimes remain in the town until we see a shipment of the imitation product on the freight platform about to be delivered to the dealer who we are operating on or investigating, in which case we take photographs of that barrel. We very often endeavor, you understand, that is their general instructions—if an opportunity presents itself to go to the rear of the dealer's store or in his cellar, and ascertain just what imitation product he has on hand. In a great many cases where the dealer states—and he does probably

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ninety-eight times out of a hundred or more—that his understanding of the term “Dope” and “Coke” means “Coca-Cola,” we then request him to make what is termed a “consumer’s test”—that is have one of the operatives stand at the fountain during an entire day and have the dispenser ask each and every customer that comes to the fountain and asks for a “Dope” or “Coke,” what they mean—that is a “consumer’s test.” That is about all the instructions unless there is some particular or special case. Very often the nature of the case decides what instructions to give, but those are the general instructions. The particular instructions given in this case was nothing more or less than the “spigot test” and the “consumer’s test.” Those are the general instructions, but specific cases require sometimes specific instructions. We made a great number of investigations, probably three thousand. I have not the slightest idea what the investigation of facts in this case has cost the Coca-Cola Company to date. The Chicago detective mentioned above were under my direction when I was connected with the [1579] Pinkerton National Detective Agency, but not when they were operating on this case. They were under the instructions of the Chicago office. About four or five ex-employees of Mr. Mayfield and the Koke Company have been summoned by the plaintiff in this case and not placed upon the stand. George H. Bodeker handled that part of the testimony entirely. He and his detective Agency were employed to locate former em-

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ployees of the Celery-Cola Company in Birmingham, Alabama, or wherever they could be found. That was an independent operation on his part; I had nothing to do with that. I do not know who assisted Mr. Bodeker in that work. I couldn't tell you how long C. J. Pogue worked assisting Mr. Bodeker. I myself served C. J. Pogue with a subpoena in this case. Mr. Bodeker did not report to my office or to the office of Candler, Thomson & Hirsch what Mr. Pogue was going to testify to, as far as I know, nor did he report to Mr. Rogers. The witnesses as a rule are seen by counsel at some time before they go on the stand, but in this case, counsel had seen none of the witnesses at Birmingham up to the time they went into the witness-room and never talked to any of them at all. I was in Birmingham before counsel arrived. I was not with them all the time, and don't know what they did when I was not present. George H. Bodeker and his assistants were the only ones who saw the Birmingham witnesses. They did all of the corraling and produced them in the witness-room. Bodeker and his detective agency were employed in this case about March 5th, when we were in Birmingham taking the defendants' testimony. Mr. Bodeker was in the room during the taking of defendants' testimony and that is the time when he was employed. [1580] Mr. Harold Hirsch suggested to me the idea of issuing a subpoena *duces tecum* for C. J. Pogue. I do not know how much C. J. Pogue was paid for services in this case on behalf of the Coca-Cola Company. I don't know that he

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was paid anything other than \$1.50 witness fee which I paid him. I don't know how many times Bodeker had seen Pogue before he was examined in this case. I don't know what information Pogue gave Bodeker other than the statement he made to him. Bodeker secured a statement from Pogue before the latter went on the stand. Just what that statement was I don't know, because I didn't go into any of the details as to what it was. I understand that statement was given sometime between March and June. I never saw Pogue in my life before this case came up. Bodeker was employed in this case to help locate the former employees in Birmingham of the Celery-*Coal* Company between the years 1901 and 1910. You ask if my crew was not competent to do that work themselves; we hadn't sufficient men—they had other work to do of equal importance, namely, making various investigations throughout a number of states of fraudulent substitution of "Coca-Cola." Part of their work included shadowing parties in this case and witnesses who testified in this case, namely Steve Mayfield. Three men were employed to shadow Steve Mayfield, namely, Sam Friend, Frank Platt and a young fellow named Daniels. These men were arrested for shadowing him and were fined twenty-five dollars each. George H. Bodeker is said to have made their bond. I should say the Coca-Cola Company had been working on this case about a year before these suits were brought, possibly two years. [1581] It is possible that they were working on this case as early as 1912. I learned

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through reports received at this office that detectives were put on the trail of J. W. Mayfield in Chicago. I received copies of the reports from the detectives. There were two detectives trailing J. W. Mayfield in Chicago, namely, a man named Veil and another by the name of Favaculo. These were Pinkerton operators. I received reports from probably three other detectives there, Marble, Wolff and W. J. Burns, and a man named Schrott. The six detectives, D. E. Bolton, F. O. Peace, S. Friend, Frank Platt Murphy, and Ross, and formerly Boswell, were employed regularly by the Coca-Cola Company. They were not employed however before this suit was brought. They were not employed just to work on this case, but were taken into the employment of the Coca-Cola Company on that work regularly when that department was organized in September, 1913. None of these boys were employed before April, 1914. Peace was the first one employed and in the interval the Pinkerton National Detective Agency did the investigation work. Since that time these men and others have been constantly employed going about the country investigating soda-fountains throughout the south. They slip up unawares at various soda-fountains—the soda-fountain men don't know they are present and make secret investigations as to what is going on there. It is a fact that at various times they have gone to the railroad offices to ascertain what products the customer was getting,—what shipments, who it was from, and what the character of the shipment was, and at times photo-

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graphs have been made of the shipments going to customers, and en route to customers. Myself and my men acting in behalf of the [1582] Coca-Cola Company have gotten, I should say, one hundred dealers to sign agreements similar to plaintiff's rebuttal Exhibits 110, 116, 117 and 118. I would say it was just about one hundred—possibly a few more. Shipments of "Coca-Cola" to these parties were made after these agreements were signed, presumably under the understanding between us contained in those agreements. Plaintiff's Rebuttal Exhibit No. 110 is a multigraphed form on the stationery of Candler, Thomson and Hirsch—bearing the watermark of Candler, Thompson & Hirsch. A large number of these was prepared. About ninety contracts similar to Plaintiff's Rebuttal Exhibit No. 110 were signed. These particular contracts were procured by Mr. Bolton and Mr. Peace, and then we procured some through attorneys, and we procured some through the mail.

XQ. 221. "I wish you would produce and file, as Defendants' Rebuttal Exhibits Nos. 8 to 98, inclusive all of the agreement similar to Exhibit No. 110.

(Mr. HIRSCH.—"And which we now tell counsel most positively we refuse to do that they are not concerned in this case in any way, shape, form or fashion.)

(Mr. LITTLETON.—"I call on the witness to produce those papers, and I would like to have the witness answer in the record.)

(Deposition of H. B. Pierce.)

(A. "On the advice of counsel, I refuse to file the papers mentioned.)

(Mr. HIRSCH.—"They are furthermore not in the possession of the witness—he has got nothing to do with them—they are not in his possession at all.")
[1583]

These contracts are in the possession of the General Counsel for the Coca-Cola Company. I have charge of the filing of them and the files are under my care, and if anything is wanted out of the files I go and get it, but I do so only with the permission of counsel. This form of contract, Exhibit No. 110, was prepared during the summer of 1914. Neither the men that are under me, nor anyone else in the employ of the Coca-Cola Company or acting in its behalf is now engaged in securing contracts of this character. I have not had any of these contracts secured by any of my men since the latter part of the fall of 1914. Yes, sir, I am absolutely certain of that fact now. I am certain of that from the simple fact they have taken up other work—investigations. That is my recollection of about when we stopped taking agreements, and resumed making investigations. I should say we stopped in the latter part of the fall or the forepart of the winter, or possibly the winter—maybe December.

You ask whether it was before October 15th, 1914; well, it may have been after. Yes, I have contracts of this character similar to Exhibits No. 110 that were secured subsequent to October 14th, 1914.

(Deposition of H. B. Pierce.)

XQ. 236. "I now call on you to produce those contracts and file them.

(Mr. HIRSCH.—"And I advise him not to do it—he hasn't control of them and cannot do it. They are not in his possession or control.")

A. "On advice of counsel, I refuse to produce and file them—they are not in my possession." [1584]

(Mr. LITTLETON.—"I now call on counsel for the Coca-Cola Company to produce and file all of the contracts secured by the Coca-Cola Company, or by its agents, or other persons acting in its behalf, since and subsequent to October 15th, 1914.")

(Mr. HIRSCH.—"Which I refuse to produce, as being entirely irrelevant and immaterial and not pertaining to this case in any way, shape or form.")

You call my attention to the fact that a contract made with A. E. Sharp, of Jacksonville, Florida, in February, 1915, was procured by an agent of the Coca-Cola Company and you ask if there is any difference between that contract and this Exhibit No. 110; that contract is already exhibited.

(Mr. HIRSCH.—"Any contract that counsel specifies that they want and that is relevant to this case, or where a witness has testified in this case, we will be more than glad to produce; but just to say 'produce all of them' at random, we refuse to do that.")

The A. E. Sharp contract was put in as Defendants' Exhibit No. 15. I am presented with Defendants' Exhibit No. 15 and my attention is called to the fact that this contract is an exact duplicate of Plaintiff's Rebuttal Exhibit No. 110, and is dated the 2d

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day of February, 1915, and I am asked whether or not my recollection is now refreshed concerning the fact that contracts similar to Plaintiff's Rebuttal Exhibit No. 110 were procured subsequent to 1914; it is possible, an isolated case or two. I cannot tell what other contracts similar to this Exhibit No. 110 were procured in the year 1915. I have the means of finding out and will investigate my files and ascertain if any other [1585] contracts similar to this were made in the year 1915.

(Mr. HIRSCH.—“It is admitted that contracts similar to Plaintiff's Rebuttal Exhibit No. 110, and Defendants' Exhibit No. 15, have been procured by the Coca-Cola Company subsequent to October 15th, 1914, and during the year 1915, and the Coca-Cola Company intends to procure other contracts similar to that when similar circumstances arise.”)

No, sir; the policy of procuring these contracts like Exhibit 110 and Defendants' Exhibit No. 15, has not been discontinued by the Coca-Cola Company. You ask that question direct, and I will answer it direct. It was only discontinued temporarily. I cannot say whether or not any contracts similar to the Exhibits referred to were procured from any other customers of any of the Koke Companies which are defendants in this case. I will make an examination of my files, and if I find any such contracts will produce and file them. I said that about ninety per cent of the contracts procured from customers, were similar to Exhibit No. 110 and Defendants'

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Exhibit No. 15. That would leave about ten other kinds of contracts. There may be a few more than that. It is a fact that the contract which I myself secured dealers to make and enter into were contracts which I wrote out myself in long hand. I myself have procured from, I should say, ten to fifteen such contracts. I have endeavored to get, and found that I could not get about for such contracts. I don't know how many contracts similar to Exhibits 110, 116, 117 and 118 my men have endeavored to get and found they couldn't get, it is a small number, the percentage is small, about possibly fifteen or twenty. [1586] Approximately one hundred and fifty people were approached either by myself or by my agents with the intention of getting them to sign contracts of this character. I do not recall their names. They were not dealers in "Koke" that I knew of. Prior to the time I went on this trip through Mississippi about February 11th, 1914, I had been out in Arkansas doing this same character of work out there. I have nothing to do with the contract similar to Plaintiff's Rebuttal Exhibit 111, 112, 113, and 114. I don't even know their contents. I don't know anything about why they have the provisions which they have. You ask what unpleasantness, if any, occurred at the Owl Drug Store, at Hattiesburg, Mississippi, on the occasion of my evening visit, at the time of my departure; I returned to the Owl Drug Store about 8:30. Mr. Williams was in the center of the store at the time and I approached

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him and asked him what decision his brother had come to regarding the entering of the agreement, and he immediately proceeded to lose his temper and said he would have nothing to do with the damned agreement and not to bother him about it. I said words similar to this: "That is not the proper spirit in which you and I should get together, let's talk this over." He said, "No, I have done all the talking I intend to do." "Well," I said, "now you and I can get together on this proposition and be good friends and all that sort of thing, and the Coca-Cola company too." Then he turned around and said, "You let me alone." I said, "I am not doing anything to you." And laughed at him. He says, "You get out of here and let me alone." "Well," I said, "I don't propose to do a thing, just merely to talk to you." "Well," he said, "You [1587] get out of here and let me alone," and with that he walked back to the prescription counter with the young man he was with, and I walked back and said, "Seeing the disposition you are in, I might as well say good-bye to you," and he then said, "Yes, you and all the damned lot of you get out of here and stay out of here." I said, "All right, Mr. Williams; good night." That is the sum total of the occurrence. Mr. Williams had been "tanking up" during the afternoon, evidently. No, sir, there was no physical encounter of any sort. There was no encounter between my body and his foot. You ask me to explain in detail the manner in which I approached Mr. Jones of the Yellow Pine Pharmacy. I approached

